Toward the Reform of Private *Waqf*s

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Toward the Reform of Private *Waqf*s

A Comparative Study of Islamic Waqfs and English Trusts

By

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To my grandfather, whose name I carry;
now I shall also carry your title. Rest in peace.

To my parents, who have persevered so I could study.

To my wife, whose love and support carried me every step of the way.

To my teachers.

And to my two boys, Mohammad and Muhannad.

Contents

Preface

High-net-worth Muslim investors are increasingly investing and accruing wealth in the United Kingdom and the demand for Shariah-compliant wealth-planning structures, such as *Waqf*s, is growing. This study accepts that *Waqf* law, as applied today, has its shortcomings and that it must be reformed. Further, as the study focuses on the United Kingdom (specifically on common law as applied in England and Wales), the apparent incongruence of *Waqf*s and trusts is acknowledged and highlighted by this study's analysis of three seminal British colonial cases that treated private *Waqf*s. The two main differences between *Waqf*s and trusts are their respective stances on perpetuities and ownership. While Islamic law, as understood by most not all jurists, mandates perpetuity for *Waqf*s, English law has a rule against perpetuities. Also, conventionally, while the trustee is seen as the legal owner of an English trust's property, most Islamic jurists maintain that no one owns *Waqf* property; it is deemed to be owned by God.

Using a combination of the comparative legal method and hermeneutics, this book reconciles Islamic law with English trust's law in these two main areas. The study does not find it necessary for one legal system to reign supreme over the other, as such solutions will be questioned by the internal subjects of the dominated legal system, undermining the efficacy of this study. Rather, reconciliation is a mutual step to congruence taken by both legal systems. In the area of perpetuities, the book finds that neither Islamic *Waqf*s must be perpetual, nor common law trusts must have a rule against perpetuities. Regarding ownership theories, the multiplicity of rendered theories in both legal systems presents more than one avenue of reconciliation. Overall, the study finds that private *Waqf*s and private trusts can be reconciled without undermining the internal hermeneutic standpoints of both legal systems.

Acknowledgements

After my last game with my weekend football team, Alra'ad, my teammates posed in front of a video camera and recorded farewell messages. One of those messages still springs to mind, my close friend Tarek Albuhaisi's. 'I pray that you return with a doctorate,' he said. I dismissed him as mad, barking mad. That was nineteen years ago when I was a twelve-year-old boy on the verge of being shipped off to boarding school in England. I never expected the journey to be so long, or the doubters to be so many. I hadn't set out to get a doctorate. Dutifully, I simply wanted to graduate from public school, complete my university education, and head back to the world I had left. Surely, it would wait for me just as I had left it, I thought.

So, before giving due credit to those who deserve it, I would like to thank myself for continuing to believe and Tarek for his prayer that never ceased to inspire. Being presented with a sketchy and general research proposal, Dr. Leslie Turano was quick to believe in my project. Initially, she took me under her wing and guided me through the daunting PhD life step by step. Constantly, she made herself available and supported me immensely. Her belief in me made me grow in confidence and stature. She had a unique way of delivering criticism in an encouraging way. When she read my work, she always did so with diligence and close inspection. Her expertise in writing skills was invaluable as was her knowledge of equity, trusts, and English land law.

Ahad, my wife, was always by side, patient and supportive. It would have been impossible to do this without her. Mohammad and Muhannad, my sons, also played their role, which mainly consisted of them nagging me out of my study to play with them when they felt that I had done enough work for the day. My parents were relentless in their patience, for my journey away from them has spanned over three decades and two millenniums.

I would like to thank Professor Paul Matthews for commenting on my work regarding British colonial cases on *Waqf*s. Professor Jeffrey Schoenblum also took interest in my work and provided useful remarks, especially with regards to the issue of perpetuities. Dr. Mohammad Zubair Abbasi, with his knowledge of Islamic law and colonial legal history, has commented on a lot of my work too and I am lucky to have had his insight. Dr. Muhammad Nsour continued to inspire me and encourage me to pursue my project. Mustafa Hussein, James Robertson, Ryan Myint and Tom Gauterin of Taylor Wessing LLP, have always taken a keen interest in my work and I am grateful to them. So have Peter Urwin, Mark Lewis and Nigel Beadsworth of Stonehage. Paul Stibbard of Rothschild also read some of my work and I am thankful for that.

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Last but not least, I would like to thank Allah for his countless blessings.

Notes on Transliteration and Translation

This work relies on sources available primarily in English and Arabic. With the exception of quotations, which are not tampered with, the transliteration system of the *Oxford Journal of Islamic Studies* is followed. Plurals of Arabic words are mostly Anglicised. For example, '*Waqf*s' are used instead of '*Awqāf*'. In addition, transliterated Arabic words are italicised, unless they are words that have also become generic in the English language, such as Islam, Quran, etc. Such words are written as they are commonly written in English. Unless their work is in English, names of Muslim scholars are also transliterated.

The names of books and their translations have been given as they appear in the original print. The names of parties to cases have been given as they appear in the report judgment.

Translations of excerpts from Arabic are mostly mine and I have indicated when that is the case in the relevant footnotes.

The Oxford University Standard for Citation of Legal Authorities (OSCOLA) fourth edition is followed for references.

Table of Cases and Statutes

Cases

Statutes

Introduction

1 Research Problem and Research Aims

1.1 *The Islamic Doctrinal Justification for the Increasing Demand for Shariah-compliance*

High-net-worth Muslim investors are increasingly investing and accruing wealth in the United Kingdom. This, coupled with Islam's growth in Europe[1] and the resurgence in Islamic conservatism that has been brought to the fore by the 'Islamic Revival', has resulted in the growing demand for Shariah[2]-compliant wealth-planning structures.[3] Foster states,

> The Islamic Revival and the success of Islamic Finance have created a new climate. The 19th century attitude of relative indifference to commercial aspects of the sharia has been replaced by a desire to see the sharia respected in all areas of life and a belief that this desire can be realised.[4]

This growing demand by Muslims for Shariah-compliance is strongly affirmed in Islamic legal doctrine. For example, the Holy Quran states, 'But no! by your Lord! they do not believe (in reality) until they make you a judge of that which has become a matter of disagreement among them, and then do not find any straitness in their hearts as to what you have decided and submit with entire submission'.[5] This and other Quranic verses have been understood by Islamic

1 John D. Snethen, 'The Crescent and the Union: Islam Returns to Western Europe' (2000) 8 Indiana Journal of Global Legal Studies 251, 'Islam is growing faster than any other religion in Europe'.

2 I use the terms 'Shariah' and 'Islamic law' interchangeably.

3 On the 'Islamic Revival', see Generally Yvonne Haddad & John Esposito, *The Islamic Revival Since 1988: A Critical Survey and Bibliography* (Greenwood Press 1997); For an explanation of the effect of the 'Islamic Revival' on the growing demands for Shariah-compliant products and structures see Nicholar Foster, 'Islamic Perspectives on the Law of Business Organisations: Part 2: The Sharia and Western-Style business Organisations' (2010) 11 European Business Organization Law Review 273; For a brief discussion on the intellectual content of the 'Islamic Revival', see Mohammad Hashim Kamali, 'Issues in the Understanding of Jihād and Ijtihād' (2002) 41 Islamic Studies 617, 633–634.

4 Foster 307.

5 *The Quran–Arabic Text & English Translation* (M.H. Shakir tr, Burhan Publications 2011), 4:65. Other Quranic verses also include this command, for example 5:44 states, 'and whoever did

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jurists as obligatory commands by God to uphold His law.[6] Additionally, on close inspection of the Quran, it is difficult to deny the legal tone many of its verses project. The Quran includes laws on murder,[7] wills,[8] warfare,[9] divorce,[10] usury,[11] documenting loans,[12] securities,[13] guardianship of orphans,[14] polygamy,[15] inheritance,[16] adultery,[17] manslaughter,[18] prisoners of war,[19] and various other legal issues; not to mention the verses that discuss ritual laws that form part of the corpus of Islamic law, such as laws on ablution, prayer,

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not judge by what Allah revealed, those are they that are the unbelievers'; 5:45 states: 'and whoever did not judge by what Allah revealed, those are they that are the unjust'; 5:47: 'and whoever did not judge by what Allah revealed, those are they that are the transgressors'; 5:48: 'And We have revealed to you the Book with the truth, verifying what is before it of the Book and a guardian over it, therefore judge between them by what Allah has revealed, and do not follow their low desires (to turn away) from the truth that has come to you; for every one of you did We appoint a law and a way'; 5:49–50: 'And that you should judge between them by what Allah has revealed, and do not follow their low desires, and be cautious of them, lest they seduce you from part of what Allah has revealed to you; but if they turn back, then know that Allah desires to afflict them on account of some of their faults; and most surely many of the people are transgressors. Is it then the judgment of (the times of) ignorance that they desire? And who is better than Allah to judge for a people who are sure?'; 33:36: 'And it behoves not a believing man and a believing woman that they should have any choice in their matter when Allah and His Apostle have decided a matter; and whoever disobeys Allah and His Apostle, he surely strays off a manifest straying'.

6 See for example, Manna'a AlQattan, *Wujoob Tahkeem Alshariah Alislamiyah* (Imam Mohammad Ibn Saud University Press 1985). AlQattan's book puts forward the Islamic juristic opinion that applying Shariah law is obligatory upon Muslims.

7 *The Quran–Arabic Text & English Translation*, 2:178.

8 Ibid. 2:180–182 & 5:106–108.

9 Ibid. 2:190, 2:216–217.

10 Ibid. 2:228–232 & 236–237.

11 Ibid. 2:275–280.

12 Ibid. 2:282.

13 Ibid. 2:283.

14 Ibid. 4:2 & 6.

15 Ibid. 4:3 & 129.

16 Ibid. 4:11–12 & 176.

17 Ibid. 4:15.

18 Ibid. 4:92.

19 Ibid. 8:70–71.

fasting, pilgrimage etc.[20] The Quran thus provided the 'framework' for Islamic 'legal thinking'.[21]

The obligation upon Muslims to apply or uphold Shariah law has also been understood to mean the prohibition on organising one's affairs or seeking judgment according to other man-made laws that contravene Shariah law. The basis for this prohibition can be found in verses such as 5:45, 'and whoever did not judge by what Allah revealed, those are they that are the unjust'.[22] Though the situation is different for Muslims who live as a minority in countries where Islamic law is not the law of the land. The European Council for Fatwa and Research's Fourth Ordinary Session in October 1999 held that 'According to Sharia, Muslims are not obliged to establish the civil, financial and political status of shari'a in non-Muslim countries, as these lie beyond their capabilities. Allah . . . does not require people to do things that are beyond their capacity'.[23]

This normative understanding of Islamic law has also been well pronounced in Western academics' writings. For example, Patrick Glenn states, 'there are major questions on the islamic side as to the extent to which islamic law can authorize adherence by muslims to non-Islamic law'.[24] Souryal affirms, '[i]n

20 It is important to note that within the internal classical hermeneutic framework of Islamic law, no normative distinction is made between law and ritual, both are of equal normative weight. See Wael Hallaq, *Shariah: Theory, Practice, Transformations* (Cambridge University Press 2009), 85 & 86, 'Neither Muslim jurists nor Muslim intellectuals at large have—until the twentieth century—made any distinction between legal and moral components of Islamic law'; 'The distinction [between law and morality], therefore, is patently Occidental, emanating from both the death in western and central Europe of transcendentalism and the (resultant) separation between law and religion . . . It is incorrect, therefore, to impose this distinction between the legal and the moral on Islamic law, for it is liable to give birth, as it did, to unwarranted assumptions, thus distorting several features of this law and its history'.

21 Ibid. 36.

22 *The Quran–Arabic Text & English Translation* 5:45.

23 See: <http://www.ecfr.org/ar/index.php?ArticleID=589>, and <http://globalwebpost.com/farooqm/study_res/i_econ_fin/ecfr-fatwa_mortgage.htm>. Shariah could not be applied without Islamic political sovereignty, and for that military might is needed to protect the political institutions. See Hallaq 199; this is what Hallaq calls the circle of justice, 'the Shari'a cannot be implemented without political sovereignty, and this cannot be attained without the military. Here, the Circle is joined'. Also see Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 2010), 199, '[Islamic law] is binding for the Muslim to its full extent in the territory of the Islamic state, to a slightly lesser extent in enemy territory'.

24 Patrick Glenn, *Legal Traditions of the World* (3rd edn, Oxford University Press 2007), 217.

Islamic jurisprudence, there is only one lawgiver (God) and Shariah law is considered God's command, demanding, authorizing, or prohibiting all human behavior'.[25] The implication of this is that '[t]he Islamic code for proper behavior is, therefore, characterized chiefly by total compliance with such commands'.[26] The main overriding function of Islamic law is to create 'the ideal relationship between man and his Creator'.[27] Logically, if one were to accept the notion that God is perfect (as Muslims do), and that He is divine, then any law He legislates is 'immutable', as its perfection is an extension of the Lawgiver's perfection.[28] Weiss states,

> [t]he world's sole creator is necessarily by right its sole ultimate ruler, legislator, and judge. All law worthy of the name must therefore originate with him. The human lawgiver is, despite his exalted position within the monotheistic scheme of things, only the mediator of the divine law to mankind.[29]

Though, admittedly, ascertaining the divine will is not always straightforward; hence, many different schools of Islamic legal interpretation have developed, these are commonly known as 'the schools of thought'. Hallaq believes that an 'adept expert' in Islamic law 'may find it as clear as the modern lawyer finds the code', but that does not mean that Islamic law has 'internal uniformity', since the 'plurality of opinion—the so-called *ijtihad*ic pluralism—is its defining feature *par excellence*'.[30] He also maintains that this plurality has been the reason why Islamic law did not remain stagnant and was flexible across different ages.[31] Weiss expands,

> . . . the declarations of jurists, authoritative as they may be, are not characterized by absolute definitiveness. At most they are statements of the jurists' opinions, expressions of what jurists *think to be* the Law of God. Muslim jurisprudence insists very strongly that the results of *ijtihād* be

25 Sam S. Souryal, 'The Religionization of a Society: The Continuing Application of Shariah Law in Saudi Arabia' (1987) 26 Journal for the Scientific Study of Religion 429, 431.

26 Ibid.

27 N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1995), 123.

28 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 2nd edn, Clarendon Press 1987), 329.

29 Bernard G. Weiss, *The Spirit of Islamic Law* (The University of Georgia Press 2006), 1.

30 See Hallaq 368.

31 Ibid. 449.

> classified as *ẓann*, or opinion, and that *ẓann* be carefully distinguished from *'ilm*, or knowledge . . . Muslim jurisprudence perhaps goes to greater lengths than other traditions of jurisprudence in emphasizing that a line clearly be drawn between opinion and knowledge in matters of law. When the Law is known, there is no need to interpret it. What distinguishes doubt from opinion is that while the doubter considers a thing to be improbable, though not categorically impossible, one who holds an opinion considers a thing to be probable, though not certain. Thus, while knowledge is correlated with certainty, opinion is correlated with probability.[32]

However, legally, this uncertainty is alleviated when a court applies a particular Islamic jurist's opinion, as this makes it final and legally binding. Weiss notes, 'When the opinion of a jurist is translated into a court decision, it becomes final and irrevocable. As a mere opinion, it is subject to review and possibly to revision; as a court decision, it is not'.[33] What is meant here is that the judge's decision is binding in that, with regard to this particular legal issue, the litigant cannot appeal to the heterogeneity of Islamic schools and claim to be an adherent of a school or opinion different from that on which the judge based his decision. It does not, however, mean that the judge's decision invalidates all other legal opinions that exist in the corpus of Islamic jurisprudence. It is merely a case-specific rule. While in theory Islamic jurists' declarations are not absolutely definitive, in court, pronouncements of Islamic judges (*Qādīs*) are. This is the point where an opinion becomes authoritative not necessarily because of epistemic, logical, or moral merit, but by the force of law, judicial, and more recently, state coercion.

1.2 *The Islamic* Waqf *Structure for Wealth-planning*

For the increasing number of Muslims who wish to organise their affairs in accordance with the dictates of their religion, Islamic law does have the *Waqf* structure, which *can* and *has been* used for wealth-planning purposes. In the past the *Waqf* was so pivotal in Islamic society that it has been described as

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32 See also, Bernard G. Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*' (1978) 26 American Journal of Comparative Law 199, 203. See also p. 204, 'The notion of opinion suggests the possibility of error, and error is contemplated by *Sunnī* theorists as an inevitable fact of legal life. Opinion is frankly admitted to be fallible: liable (although not necessarily prone) to error'.

33 Ibid. 205. However, in Islamic countries today, one can appeal against decisions of lower courts of law, in a similar procedure to common or civil law courts.

providing 'the foundation for Islamic civilizaiton'.[34] Abbasi has described *Waqf* in the past Muslim societies 'as the most suitable legal form for financing long lasting services'.[35] It serviced most of the public sector, also funding a multiplicity of societal service providers from mosques and schools to hospitals, inns, and highways, among other things.[36] *Waqf*s have also been used for private purposes, such as family *Waqf*s that created emoluments for the purpose of the settlor's (*Wāqif*'s) family members.[37]

However, at present, for doctrinal and policy considerations that will be discussed in my book, constituting *Waqf*s is not pragmatically an ideal that high-net worth Muslims in England can easily pursue, unless *Waqf* laws and regulations can undergo significant reforms. The responsibility for this state of affairs is shared between the *Waqf* institution's stagnation and lack of reform, and English law's rigidity as to some of its policy considerations and doctrinal positions when it comes to the law of trusts. This creates a conundrum: on one hand, an increasing number of Muslim investors would like access to the UK economy's vast resources and massive wealth and are willing to be active participants in its growth. On the other hand, a segment of those investors would like to pursue such investments using wealth-planning structures that do not contravene their religious dictates. Saying that this request undermines the UK's rule of law would be excessive as; after all, these investors' request is a private law matter that should be compartmentalised under the dictates of 'party autonomy'.[38] In other words, it only contravenes the UK's rule of law

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34 Muhammad Zubair Abbasi, 'Sharī'a under the English Legal System: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law' (DPhil thesis, St. Hilda's College, Faculty of Law, Oxford University 2013), 44.

35 Ibid.

36 Ibid.

37 However, see ibid. 46, Abassi states, 'the categorisation of waqf into either public or private was in itself a product of the British period. An archetypal waqf was a mixture of public and private interests, though awqāf in favour of mosques and other religious and public places could be distinguished from a typical family waqf which functioned as a family settlement. But the remainder in this family settlement was reserved for public charity'. See also pp. 56–61. Though, classic Islamic law texts do refer to *Waqf Khāṣ* (special) and *Waqf ʿām* (general), see p. 57; Al-Māwardī, *Al-Aḥkām As-Sulṭāniyya* (Assadullah ad-Dhaakir Yate tr, Ta-Ha Publishers 1996), 124–125.

38 See Jeremy Waldron, 'Questions About the Reasonable Accommodation of Minorities' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press 2010), 105, 'The rule of law is not incompatible with the idea of there being complex as opposed to simple laws, nor laws riddled with exceptions of various sorts set up to accommodate purely commercial or material interests. Often these are the products of shady political deals. So long as these are allowed, it seems unfair not to countenance the prospect of

as much as a bipartite contractual choice-of-law clause designating French or German law would.

While there are shared features between the *Waqf* and the trust, they are conceptually and practically different in some key areas, most importantly in their concepts of ownership and in their contrasting stances regarding perpetuity in settlements. Depending on which prism one uses to view these contrasting structures, advantages could be argued for both. For example, viewed from a commercial stance, the trust does seem more advantageous. Trusts are managed better from a professional perspective and are more strictly regulated. In addition, the flexibility on how long they can exist for and when interests can vest is also an attraction. Yet, if we view both structures from an internal Islamic legal perspective, a perspective that embeds Islamic legal hermeneutics in the most general sense, the trust looks less advantageous as it lacks the religious platform or 'stamp' necessary to make its mere constitution an act that would bring its constitutor (the settlor) closer to God, in a way that is promoted by Islam.[39]

The key is for us to find, or perhaps to create, a structure that would entail those features that make trusts so commercially attractive, while remaining true to the requirements of both Islamic *Waqf* law and English trust law. This is a difficult feat to achieve but it should be achievable, in theory at least, given the rich diversity of interpretations inherent in the Islamic legal tradition, and given the common law's incredible ability to adapt. Both the Islamic legal tradition and the common law are 'major world legal systems', which makes it all the more important to justify novel legal interpretations, or positions, from within the internal epistemological and doctrinal heritage of both legal systems.[40] In other words, outright and internally unjustified legal transplants

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'accommodations' for the sake of people's culture, religion, or traditions, especially if these can be presented as just and reasonable'. In 2000, Snethen predicted that Islamic personal law would be 'the basis for legal battles within Western legal systems', see Snethen 262.

39 Timur Kuran, 'The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System' (2001) 35 Law and Society Review 841, 842, 'The reason the waqf is considered an expression of piety is that it is governed by a law considered sacred, not that its activities are inherently religious or that its benefits must be confined to Muslims'.

40 See Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26 American Journal of Comparative Law 187, 187. Badr defines a major world legal system as 'those legal systems whose application extended far beyond the confines of their original birth places and whose influence, through reception of their principles, techniques or specific provisions has been both widespread in space and enduring in time. Measured

will not suffice, as legal transplants risk rejection because they undermine recipients' pride in their own legal systems.

1.3 *Research Aims*

Two legal themes will be explored. The first will consider how the Islamic *Waqf* can be reformed using English trust concepts, seeking justification for these concepts from the internal hermeneutic model of Islamic law. One of Islamic law's peculiarities, and strengths, is that it has a rich heritage of many contrasting legal interpretations. Hence, transferring a concept, on some occasions, can simply mean promoting a less famous and less implemented interpretation in favour of the contemporary overriding one. Interpretations in Islamic law are not final or conclusive,[41] but because of their high level of heterogeneity they have the propensity to cover a wide range of the legal approaches that have been adopted by different legal systems.[42] The second theme will ascertain the extent to which English trust law can be analysed in a way that admits the accommodation of *Waqf*s.

The first theme involves analysing the interplay of Islamic *Waqf* law and English law in colonial times, as that is the best and closest example of how the two legal systems functioned within the same legal boundaries. The analysis is not exhaustive but selective of seminal cases that embody the height of the legal clash between Islamic *Waqf* law and English law. The book will discuss the contemporary repercussions of this analysis with a view to suggesting feasible ways in which the Islamic *Waqf* law can operate in English law with the least possible upset to the English legal rubric and public policy ideals.

The first chapter will discuss methodology and the method employed in this book. This will involve a discussion of the special considerations that must be noted when conducting comparative legal research that involves Islamic law as one of the models of comparison. The second chapter will enumerate the

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by this yardstick only three legal systems qualify as major world legal systems. These are Roman law, Islamic law and common law'.

41 Dominic Selwood, 'Islamic Contracts in a Modern Legal Context' in Humayon Dar & Umar Moghul (ed), *The Chancellor Guide to the Legal and Shari'a Aspects of Islamic Finance* (Chancellor Publications Limited 2009), 26. He states, 'Foremost is the fact that lawyers and financiers familiar with the Common Law or Civil Law . . . are accustomed to an ultimate legal or judicial authority . . . No such concept exists with regard to the Shari'a. Instead, Islam welcomes and encourages diversity of views . . . There is no ultimate authority'.

42 Though, of course, not all legal approaches can be justified from within the internal structure of Islamic law.

various criticisms levelled at the *Waqf* institution as it stands today. Five main criticisms will be explored, three will be responded to in the chapter while the other two will be the platform for the rest of the book. These two main criticisms are the *Waqf*'s mandated perpetuity law and the *Waqf*'s ownership structure.

Chapter three will be devoted to the discussion of perpetuity, analysing colonial cases that applied the common law rule against perpetuities to *Waqf*s. Additionally, chapter three will also look at alternate common law jurisdictions, such as various US states, that have abolished the rule against perpetuities and now have what is known as 'dynastic trusts'. In an attempt to find reconciliatory ground, the chapter will also evaluate opinions within the Islamic law corpus that allow temporary *Waqf*s, doing away with the law of mandated perpetuity.

Finally, chapter four will discuss ownership theories in Islamic and common law in general and, more specifically, *Waqf* and trust ownership theories. The word 'theories' is used in the plural because there are a myriad of theories that attempt to describe the ownership structure of *Waqf*s and trusts. Congruence in this area, as well as in the area of perpetuity, can either be reached by a compromise in common law theory, or a compromise in *Waqf* theory. Which is used will have to depend on various issues, most important of which, is the jurisdiction in which reform is sought. So, for example, if *Waqf* reform is sought in the English jurisdiction, a more pragmatic solution would entail the compromise being in *Waqf* theory so as not to upset the rubric of English law, and vice versa. This book not only aims to show that reconciliation between *Waqf* and trusts law is possible; it is possible in multiple ways.

2 Research's Wider Discourse

I situate this research in a range of wider discourses; two of which are of most interest. Before I discuss the two wider discourses, it is important to note that this research is not aimed at answering the larger discursive questions. Though, undeniably, the answers provided for in the narrower questions situated within the broader discourse may shed light and aid in providing answers to the wider discursive questions. That is the only extent to which the wider questions will be treated. Even if the wider discursive questions remain unresolved, it is important to bear them in mind as, otherwise, this research, and others like it, will seem like highly specialised micro-legal research aimed at only a handful of legal academics who share the same micro-legal interests. In

addition to answering specialised and difficult legal questions, the aim of legal research should also be to find its place in the wider general debates, and situate itself in them; for only then will such research have a wider impact.

2.1 *The First Wider Discourse: The Place of Religious Law in the Wider National Secular Legal System in a Multicultural Society*

The first discourse is the debate on multiculturalism and the place of religion in the new ever-evolving multicultural society. For religions, like Islam, which have legal systems, the debate in the Western backdrop is on the place of that legal system on the domestic level, and it is an extension of the debate on the place of a minority religion in society. Is it a question of assimilation or accommodation? Assimilation defies multiculturalism, for if all sub-cultures were integrated into the main or dominant culture, then multiculturalism will no longer exist. Multiculturalism, by its very nature, is a term that signifies the co-existence of a number of cultures. Although, realistically, all contemporary multicultural societies generally do have a dominant culture, this dominance should not necessarily entitle the dominant to force assimilation on minorities. J. de Roover and S. Balagangadhara assert that if 'we desire to find new solutions to the growing pluralism of our multicultural societies, it is advisable to stop looking at the world through Christian glasses'.[43] Chief Rabbi Professor Jonathan Sacks explains, '[i]n a plural society, by definition, moral authority does not flow from a single source. Instead it emerges from a conversation in which different traditions (some religious, some secular) bring their respective insights to the public domain'.[44]

This should not deflect attention from the fact that some academics do hold the view that religious legal systems should all give way 'to the homogeneous and 'neutral' conception of the common good as expressed through the law of the state'.[45] Rivers does accept that in a liberal society, freedom of religion should exist; however, it should, as he believes, exist 'with no publicly

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43 J. de Roover and S. Balagangadhara, 'John Locke, Christian Liberity and Predicament of Liberal Toleration' (2009) 36 Political Theory 524, 524, quoted by Silvio Ferrari, 'Law and Religion in a Secular World: A European Perspective' (2012) 14 Ecclesiastical Law Journal 355, 362.

44 *Royal Commission on the Reform of the House of Lords: A House for the Future* (*The Wakedam Report*) (2000), para. 15.5. See also, Charlotte Smith, 'The Place of Representatives of Religion in the Reformed Second Chamber' [2003] Public Law 674, 684–688.

45 Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecclesiastical Law Journal 371, 396. Rivers does not only make normative statements with regards to this issue, he also makes descriptive statements such as, 'the idea that religions command respect on the part of secular governmental institutions because they consist of, or

cognisable weight'.[46] Writers such as Michael Nazir-Ali believe that the advocation of Shariah law poses a 'poignant test' to the commitment to 'participatory democracy'.[47] Yet, he does accept that insofar as it is 'regulated by the law of the land' some room is there for the provision of 'Shari'a-compliant products for those with traditional scruples'.[48] John Witte believes that Shariah advocates should not falsely assume that 'freedom of religious exercise must always trump'.[49] He adds that Shariah advocates should understand four lessons;[50] the first three are of value to this research context.[51] First, secular legal systems take time to adjust to the realities of new religious groups.[52] Secondly, religious groups need flexibility and innovation to win some accommodations from secular laws.[53] Thirdly, religious groups must at least tolerate the core values of the secular host legal system.[54]

It is important to bear in mind that the research pursued in this book does not concern imposing any element of Islamic or religious law in the English public sphere.[55] Rather, it is about allowing individuals, in their private sphere (which includes how they plan their personal wealth and its allocation), to govern that particular sphere in the way that best eases their conscience. Moreover, this aim is sought with no or minimal disturbance to the policy inclinations of the public sphere. Here, a difference can be found between

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contain, autonomous systems of law is being lost in the inexorable rise of a dominant state-individual paradigm and the embrace of state regulation' at 394.

46 Ibid.

47 Michael Nazir-Ali, 'Islamic Law, Fundamental Freedoms, and Social Cohesion: Retrospect and Prospect' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press 2010), 89.

48 Ibid. 84.

49 John Witte, 'The Future of Muslim Family Law in Western Democracies' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press 2010), 286.

50 Ibid. 289–290.

51 Witte writes in the context of family law, which differs from our private property law context.

52 Witte 289–290.

53 Ibid.

54 Ibid. For the same of completeness, the fourth lesson is that Muslim tribunals must become more legally sophisticated and procedurally equitable to be both attractive to voluntary Muslim disputants and acceptable to secular laws.

55 Some academics do not believe that the public and private are 'two mutually exclusive domains'. See Pascale Fournier, 'Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada' (2012) 8 International Journal of Law in Context 47, 48. She asserts that the public and private should be conceived as 'one highly complex battlefield which distributes differentiated costs and benefits'.

secularism and militant secularism. Secularism frees the public sphere from the intervention of religion and dogmatism. Militant secularism is dogmatic in the sense that it attacks individuals' private sphere in pursuit of indoctrinating them with the ideals of secularism. So, while secularism's main aim is to keep the public sphere free of religious intervention, militant secularism attacks private spheres with that same very goal; the difference is that the latter becomes an ideology in its own right.[56] This is what Simon Lee alluded to

56 An example of militant secularism is the French ban on the face veil, also known as *Burqa* or *Niqab*. See Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: Laicite, National Identity and Religious Freedom' (2012) 61 International and Comparative Law Quarterly 613, 638–639, 'As in 2004, the prohibition of a certain type of religious symbols was seen as the answer to force integration of minority groups. As such, the 2010 ban may tie in with current debates on multiculturalism and integration across Europe, including in the UK. But this political timeliness is not enough to ground the law in the traditions of secularism and feminism. The absolute scope of the law which covers the whole of the public space betrays both secularist and feminist tradition by leaving no scope for the expression of difference within the public sphere and by leaving no room for subjective views of dignity by veiled women. None of the arguments invoking the concepts of *laïcité*, equality, dignity or '*social ordre public*' as evidence of a unique French manifestation of secularism and feminism is convincing. The 2010 ban falls outside of the boundaries of the notion of *laïcité*. Even the most virulent forms of *laïcité* cannot stretch beyond public services or public agents and be applied to places and people who in no way emanate from the State. If they did, *laïcité* would no longer be a mode of Church/State relationship which leaves room for the manifestation of individual beliefs but would become a vehicle for State indoctrination. Nor is the 2010 ban about protecting women's dignity and equality. Such paternalistic views of dignity cannot be enforced where no conclusive empirical evidence suggests that the full veil is in most cases worn as a result of coercion. If they were, individual autonomy and liberty in the public sphere would simply be denied. Finally, the 2010 ban cannot rely on the notion of '*social ordre public*'. While the 2010 law is indeed about promoting common values and fostering a way of 'living together', '*un vivre ensemble*', in a legal system committed to human rights, this goal cannot be enforced at the cost of civil liberties. Proportionate interferences with religious freedoms may be justifiable but the absolute negation of individual rights—be it in respect of a garment that appears so alien and extreme—cannot in law be upheld. Despite the recent approval bestowed by the French Constitutional council, it is predicted that the law will fall foul of European Convention requirements. Even if—given the wide margin of appreciation that the European Court grants to Member States in these areas—*laïcité* may well (but wrongly in my view as argued above) qualify as a legitimate goal pursued by the ban, the 2010 ban is bound to fail for want of proportionality between the aim sought and the absolute and unqualified restriction on religious freedom it carries. Secularism, *laïcité* and multiculturalism as it has been said are all tools designed to manage diversity. As such, they can never endorse measures which aim at erasing differences altogether. For the sake of *laïcité* and multiculturalism as well as for human rights, it is to be hoped that the 2010 ban will not become the new model for Europe.'

when he said, 'liberals, like everyone else, want the law to enforce morality—their morality of liberalism . . . there is no cause to regard liberalism as necessarily a superior creed solely because it is sometimes represented as being morally neutral'.[57]

Even if one accepts that Islamic law potentially has some space in the modern British multicultural society, this should not mask the fact that the striving for such a space is born out of a difficult challenge. On the one hand, legal pluralism, in any form, challenges the notion 'of state law as the only and privileged source of law';[58] and, on the other hand, minority groups, such as Muslims, view the absolute and unfettered application of state law as a threat to their cultural identity.[59] Tariq Modood echoed this latter concern, 'Our common citizenship should not swamp our other identities (that is usually a recipe for cultural majoritarianism) but should allow difference to co-exist, and interact, with commonalities'.[60] Ultimately, freedom to govern one's affairs as one sees fit should be the presumption. Freedom is not a privilege, it is a right; thus, its restriction should be answerable, not its expansion.[61]

In addition to the freedom argument put forward in the previous paragraph, a second argument could also clarify the need for Muslims, and other cultural or religious minorities, to have elements of their legal or cultural norms recognised within the wider national legal system, insofar as those elements are not patently offensive to the wider legal system's public policy considerations. This may be called the 'equality' theory and it is based on the argument advanced by Valerie Paisner in her case for a Jewish exemption from the humane slaughter legislation.[62] For our purposes, the legal point in contest is not relevant; what is useful is Paisner's formulation of the 'equality' argument. The issue

57 Simon Lee, *Law and Morals: Warnock, Gillick & Beyond* (3rd edn, Oxford University Press 1986), 15.

58 Andrea Buchler, 'Islamic Family Law in Europe? From Dichotomies to Discourse—Or: Beyond Cultural and Religious Identity in Family Law' (2012) 8 International Journal of Law in Context 196, 208.

59 Ibid. 196.

60 Tariq Modood, 'Multicultural Citizenship and the Shari' Controversy in Britain' in Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press 2010), 41.

61 See Roger Trigg, 'Religion in the Public Forum' (2011) 13 Ecclesiastical Law Journal 274, 278. He states, '[w]e are not allowed to be free by the gracious act of a state that ultimately controls us. We belong to a state through consent, and our basic freedoms and rights have to be recognised'.

62 She was referring to s.36(1) Slaughterhouses Act 1974 and s.1(1) Slaughter of Poultry Act 1967, which have both been repealed by Welfare of Animals (Slaughter or Killing) Regulations 1995/731, Sch.13 para.1.

is 'not about formal equality';[63] meaning that, for our purposes, there is no dispute that personal property law gives equal opportunity for the creation of trusts to all who wish to do so. The law does not give a Christian more of a right to do so than a Muslim or vice versa; though, undeniably, there may be social or economic restraints on some merely by virtue of the distribution of wealth, but that is another matter. The argument is about 'substantive equality'; a law that treats everyone equally, making no exceptions to certain groups or individuals, may in fact result in creating unequal opportunities for those who find that law morally or culturally repugnant.[64] In the case of personal property law and trusts, a law that did not accommodate Muslims' legal sensitivities with regard to wealth planning, may result in Muslims being denied the opportunity to plan their wealth, and that is 'substantive' inequality.[65]

There is no denying that the place of religious law in a multicultural, though secular, society is not clear and many questions must be answered before an argument for religious laws can be taken more seriously. For example, how will the dominant national legal system regard the normativity of religious law with regards to members of that particular religion? After all, 'religious groups . . . are themselves multicultural, composed of members from a diversity of ethnic backgrounds and therefore of all races'.[66] Will the dominant national legal system end up recognising various laws within each religious law? This and other questions are worthy of exploration. However, this is as far as the scope of this research allows one to go into this topic, and it is enough to say that the question in this research is based on championing autonomy in allowing private parties to plan their wealth in accordance with their religious dictates. As the issue of private wealth planning is a private law matter, championing party autonomy is less complicated as it has minimal effect on the wider public legal diaspora.

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63 Valerie Paisner, 'Jewish Exemption from Humane Slaughter Legislation' (2004) 11 UCL Jurisprudence Review 1, 2.

64 Ibid. 2–3.

65 I am aware that this is pure theory and that the issue is not so clear-cut in practice. There is always a gap between law in books and law in action, and Islamic law is not an exception. However, it is important to formulate a theoretical model that justifies the application of elements of religious law in a larger secular legal system and to do so, pure assumptions or premises such as been made above must be articulated.

66 Anthony W. Jeremy, 'Religious Offences' (2003) 7 Ecclesiastical Law Journal 127, 138.

2.2 *The Second Wider Discourse:* Ijtihād *in Islamic Jurisprudence and Its Necessary Revival*

The laws of *Waqf* are primarily a product of what is known in Islamic jurisprudence as *Ijtihād*.[67] This does not mean that no other source was used to deduce *Waqf* laws; it is simply that *Ijtihād* is the *most important* source and the source most suited to develop and modernise *Waqf* laws.[68] Schoenblum alleges that 'while there have indeed been differences of interpretation and practice by various schools of Islam, fundamentally, the parameters within which the *waqf* may evolve are narrow'.[69] Indeed, *Waqf* can only evolve within narrow limits in the sense that it can only evolve within the Islamic legal tradition's hermeneutic model. But that is not only true for Islamic law; every law must develop within the legal heritage in which it will apply. Even transplanted law must evolve, to various extents, when it is transplanted into a foreign legal system.[70] Yet, to claim that the Islamic legal tradition's hermeneutic model is

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67 Naṣir Almīmān, *Alnawāzil Alwaqfiyah* (Dār Ibn Aljawzi 1430 AH), 7 & 147; Muṣṭafā Alzargā, *Aḥkām Alwaqf*, vol 1 (2nd edn, Dār Ammār 1998), 19; Moḥammad Alkubaysī, *Aḥkām Alwaqf fī Alsharīʿah Alislāmīyah*, vol 1 (Maṭbaʿat Alirshād 1977), 3. The term *Ijtihād* will be explained at length below.

68 Most, if not all, of the pertinent *Waqf* legal questions that will be comparatively analysed in this book are products of *Ijtihād*. The ownership theory and the rule mandating perpetuity in *Waqfs*, for example, are both products of *Ijtihād* and as a consequence no conclusive doctrinal position could be claimed in Islamic law with regards to these issues. In other words, they are open to re-interpretation, or, if alternate interpretations already exist within the Islamic legal corpus, a jurist may adopt an alternative interpretation if he epistemologically feels it is a more correct one.

69 Jeffrey A. Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic *Waqf*: A Comparison with the Trust' (1999) 32 Vanderbilt Journal of Transnational Law 1191, 1198–1199.

70 Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 Modern Law Review 11, 12. He states, '[W]hen a foreign rule is imposed on a domestic culture, . . . [i]t is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. . . . It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'. A similar reshaping is necessary when dealing with classical legal material and ideas, see Roscoe Pound, 'The Revival of Comparative Law' (1930) 5 Tulane Law Review 1, 7, 'It was necessary to reshape the legal materials which had come down from the Middle Ages in order to adapt them to the demands of

narrow is an anomaly. By virtue of its rich heritage, heterogeneous schools, and advanced interpretive methodology, Islamic law has a broad platform from which to develop and modernise the laws of *Waqf*. The first and foremost interpretive tool that could aid in this pursuit is *Ijtihād*.

2.2.1 The Nature of the Islamic System and the Scope of Ijtihād Enquiry

Islamic law exists across national boundaries; its jurisdiction is the conscience of Muslims.[71] It is a non-state law and it exists everyday in absence of a state legal system (of course, this depends on how one defines law). According to Islamic precepts, law is all encompassing; touching all areas of life. Even permissibility (*Ibāḥa*) is explicitly a legal norm in Islamic law. What this means is that where there is no specific law prohibiting or enjoining a particular act; the presumption is that it is permissible (*Mubāḥ*). This permissibility is derived from God's permission. So, drinking water is *Mubāḥ*, meaning that the Islamic legal norm attached to it is *Ibāḥa*. Rituals also form part of the Islamic legal corpus; praying, paying alms tax, fasting, performing pilgrimage etc., are all seen as legal obligations in Islamic law.[72] Badr states,

> The *Shari'a* indicates not only what the individual is entitled or bound to do in law, but also what he or she ought, in conscience, to do or refrain from doing. Accordingly, certain acts are classified as praiseworthy (*mandub*) which means that their performance carries religious

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an age of competitive individualism. It was necessary to reshape them to the ideals of the age of the classical economics. In America this reshaping and adaptation had to go much further in order to meet the requirements of an ultra-individualist pioneer society in a time of discovery, of continual opening of new areas to settlement and setting up of new commonwealths, and of exploitation of the resources of nature . . . Also American lawyers had to take account of the exigencies of a different social and political order and a simpler economic organization . . . in Novanglus (1774) John Adams had argued against the proposition that the colonists, of legal necessity, had brought English law with them and were bound thereby. He contended that they were entitled "to just so much of it as they pleased to adopt," and that "they were not bound or obliged to submit to it unless they chose it." '

71 See John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), 166–167. Bell briefly notes, '[a]n individual citizen will not only be law-abiding, but may be religious and belong to a particular interest group, all of whose perspectives will come to bear on what is the right thing to do all things considered. However, the statements are normative *from the legal point of view*'.

72 All Islamic jurisprudence manuals or treatises must cover rituals or acts of worship. In fact, the discussion of rituals typically takes up half of Islamic jurisprudential manuals or treatises.

> merit and their omission religious demerit. Other acts are classified as blameworthy (*makruh*) which means that omission of them is meritorious and commission demeritorious. In neither case, however, is there any legal sanction of punishment or reward, of nullity or validity in law. Other legal systems do not concern themselves with such acts, which are considered beyond the purview of the law and belong to the realm of ethics.[73]

This illustrates that Islamic law lives on without the mechanism of state enforcement. In the words of Joseph Schacht, 'Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself'.[74] To say it boldly, Islamic law exists in the UK whether one likes it or not. In fact, Islamic law exists in any place where Muslims abide. The issue is, therefore, not to theorise about a fictitious Islamic legal system akin to the English legal system; rather, it is to understand best how to accommodate those features of the Islamic legal system that most visibly clash with the English legal system. English law is not bothered if one prays five or fifty times a day; it is, however, affected if a Muslim seeks to set up a perpetual private wealth-planning structure (i.e. a *Waqf*), which conflicts with or undermines the rule against perpetuities. To understand this better, picture a French citizen, for example, living in the UK. He does not seek to apply French laws privately. He may exhibit elements of his culture but he does not see that as law. Conversely, a Muslim lives by Islamic law because he is consciously bound to do so. When viewed from a Muslim's perspective, this is not a mere moral requirement; it is a legal requirement that has retributive repercussions, if not in this world, then in the hereafter.

Consequently, this research focuses on applying Islamic *Waqf* law within the English legal system. The context in which Islamic law is to be applied has not changed. For a better chance of reconciliation, modernising the laws of *Waqf* may necessitate transplanting English trust concepts into the corpus of Islamic *Waqf* law. Transplanting the whole trust would mean that it is just that, a trust, not an Islamic *Waqf*.[75] To receive internal Islamic legal validation, such transplants must be vindicated from within the Islamic legal system before being adopted by it. Otherwise, adherents of the Islamic system would not take

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73 Badr 189.

74 Schacht 1.

75 This does not necessarily mean that Islamic law may not or cannot accommodate the English trust. That is a different issue, which, although important, has no place in this book.

a legal transplant seriously. The only means for such vindication is through an Islamic interpretive process known as *Ijtihād. Ijtihād*, if properly adopted, ensures the dynamism of Islamic law and its continuous capability to meet contemporary demands.

2.2.2 Definition of Ijtihād and Preliminary Observations

Ijtihād is the most important source of law after the Quran, *Sunnah* (Prophetic sayings), and *Ijmāʿ* (consensus of scholars).[76] It is vital because it ensures the continuous development of Islamic law.[77] Legal texts are finite, and novel circumstances are infinite. In the Arabic language the term *Ijtihād* is 'a derivation from the root word *jahada, ijtihād* literally means striving, or self-exertion in any activity that entails a measure of hardship'.[78] In Islamic jurisprudence, *'Ijtihād* is defined as the total expenditure[79] of effort made by a jurist in order to infer, with a degree of probability, the rules of *Sharīʿah* from their detailed evidence in the sources'.[80] Weiss defines it as, '[t]he interpretive toil of a jurist attempting to formulate the law on the basis of the foundational texts'.[81] A modern definition preferred by Kamali is, 'a creative but disciplined and

76 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003), 468; Kamali, 'Issues in the Understanding of Jihād and Ijtihād', 624.

77 Kamali, *Principles of Islamic Jurisprudence*, 468.

78 Ibid. 469; Ibn Qudāmah Almaqdisī, *Rawḍat Alnāthir wa Junatu Almunāthir*, vol 2 (Saʾad Alshathri ed, 1st edn, Dār Alḥabīb 1422 AH), 443; Moḥammad Alfutūḥī, *Mukhtaṣar Altaḥrīr fī Usūl Alfiqh* (Moḥammad Ramaḍan ed, 1st edn, Dār Alarqam 2000), 241; 'Abdul Qādir Ibn Badrān, *Almadkhal 'Ilā Mathab Alimām Aḥmad Ibn Ḥanbal* (1st edn, Alrisālah 2011), 367; Moḥammad Alghazālī, *Almustaṣfā* (Moḥammad Alshafi ed, 1st edn, Dār Alkutub Al'ilmiyah 1993), 342; Moḥammad Alrāzī, *Almaḥsūl*, vol 6 (Taha Al'alawāni ed, 3rd edn, Alrisālah 1997), 6; 'Ali Alāmidi, *Aliḥkam fi Usūl Alaḥkam*, vol 4 ('Abdulrazzāq 'Afifi ed, Almaktab Alislami), 162; Moḥammad Alshawkāni, *Irshād Alfuhūl Illa Taḥqīq Alḥaq min 'ilm Alusūl*, vol 2 (Aḥmed 'ināyah ed, 1st edn, Dār Alkitāb Al'arabi 1999), 205.

79 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 207, 'The definition emphasizes that the search must be total, involving the jurist's utmost energies. If the jurist has failed to discover evidence which he was quite capable of discovering, his opinion is void. Admittedly, the fulfillment of the condition that the jurist make a "total expenditure of effort" in his search for an opinion can be verified only by the jurist himself. Such subjective verification entails an exercise of conscience. In Islam each individual, ultimately, is directly responsible to God'.

80 Kamali, *Principles of Islamic Jurisprudence* 469; Almaqdisī 443–444; Alfutūḥī 241; Ibn Badrān 367; Alghazālī 342; Alrāzī 6; Alāmidi 162; Alshāh Wali Allah Aldahlawi, *'Aqd Aljīd fi Aḥkam Alijtihād wa Altaqlīd* (Moḥibaldīn Alkhatīb ed, Almatba'a Alsalafiyah), 3; Alshawkāni 205.

81 Weiss, *The Spirit of Islamic Law*, 201.

comprehensive intellectual effort to derive judicial rulings on given issues from the sources of the *Sharīʿah* in the context of the prevailing circumstance of the Muslim society'.[82] A *Mujtahid* is the person qualified to perform *Ijtihād*.[83]

Ijtihād corresponds closely to what 'Western jurisprudence' knows as interpretation.[84] Some have even defined it as 'Islamic interpretation'.[85] Though, in Islamic law, what is being interpreted is not the law, but its sources.[86] *Ijtihād* reflects Islamic law's intellectual legal ordering.[87] The aim is to generate or formulate legal norms for the continuous array of circumstances that occur as society advances and develops. *Ijtihād* is altruistic, Weiss explains, 'the mujtahid formulates a law relevant to real human life. Ijtihād is thus essentially altruistic; it is interpretation for others, for society as a whole'.[88]

This formulation is to be conceptualised as discovering the law, rather than creating it.[89] The law is there, in its sources, waiting to be discovered as time progresses; it is just 'not self-evident'.[90] Performing *Ijtihād* is a 'religious duty'.[91] This is so because although Islamic law was revealed by God, not all rules are explicitly 'spelled out'.[92] Weiss states, 'Because the Law is buried, as it were, within the (legally) imprecise and sometimes ambiguous language of the sacred texts, it is said to be extracted from the texts; and it is for this reason that the texts are to be considered sources of the Law rather than the Law itself'.[93]

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82 Kamali, 'Issues in the Understanding of Jihād and Ijtihād', 623.

83 Schacht 37.

84 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 200.

85 Charles Kurzman (ed) *Liberal Islam: A Sourcebook* (Oxford University Press 1998), 329, quoted in Scott C. Lucas, 'Abu Bakr Ibn Al-Mundhir, Amputation, and the Art of Ijtihād' (2007) 39 International Journal of Middle East Studies 351, 351.

86 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 200.

87 Arthur Von Mehren, 'An Academic Tradition for Comparative Law?' (1971) 19 American Journal of Comparative Law 624, 631.

88 Weiss, *The Spirit of Islamic Law*, 128.

89 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 200.

90 Ibid.

91 Kamali, *Principles of Islamic Jurisprudence*, 471. For the Islamic normative justification for *Ijtihād*, see Moḥammad Alshāfiʾī, *Alrisālah* (Aḥmad Shākir ed, 1 edn, Maktabat Alḥalabi 1940), 486–502; M. Ṣaghīr Ḥasan Maʾṣūmi, 'Ijtihād Through Fourteen Centuries' (1982) 21 Islamic Studies 39, 39–40. Even a layman who has no expertise has to perform a level of *Ijtihād* in that he has to choose which Islamic jurist to follow, see ʿAbdulmalik Aljūwayni, *Alijtihād* (ʿAbdulḥamīd Abuzaneed ed, 1st edn, Dār Alqalam, Darat Alulūm Althaqāfiyah 1408 AH), 127–129; ʿAbdulraḥmān Alsuyūṭī, *Taqrīr Alistinād fī Tafsīr Alijtihād* (Fouʾād Aḥmed ed, 1st edn, Dār Aldaʾawa 1403 AH), 51–52.

92 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 199.

93 Ibid.

If it were not for the process of *Ijtihād*, Islamic law would not contain an adequate body of positive laws sufficient to have it classed as a major legal system.

Ijtihād, as explained above, is essentially an interpretive enterprise. It is not aimed at interpreting rules *per se*, as the whole necessity of *Ijtihād* arises by virtue of there being no Islamic rules on a particular matter.[94] *Ijtihād* is the Islamic way to legislate; it is a legislative initiative that is based or grounded in the interpretation of the sources of Islamic law.[95] This grounding in the sources is what maintains the 'Islamicity' of the legislated law, and therefore this is what ensures that Muslims continue to live by the 'divine' law. If this is understood, then two points must be addressed.

First, as many of the laws inherent in the Islamic sources are not immediately discoverable, an interpretation or a discovery of the law is not conclusive. For if it were so straightforward, it would have not necessitated *Ijtihād*. For example, the Holy Quran, in many verses, orders believers to pray.[96] Any lay Muslim can understand that this is a legal norm making prayer incumbent upon Muslims.[97] However, some of the intricacies of how prayer is to be performed are not as self-evident. For instance, must a man pray all his prayers in congregation, or can he pray them solitarily?[98] While each school is free to adopt, and even dogmatically defend and advertise, its opinions, the reality is that such an issue has not been and will never be conclusive in Islamic law. Weiss says, '[t]here is no authority vested in the jurist in the sense that his declarations are automatically accepted as valid. Rather, the authority of the jurist rests upon the intrinsic validity of what he declares. His authority is dependent upon the methodology which he employs'.[99] A jurist—who is appropriately trained—undoubtedly has a level of authority, though in inconclusive matters

94 Note that, in addition to its use as a term to denote the process of generation of rules, some Islamic jurists may loosely use the term *Ijtihād* when interpreting rules as well.

95 See Zweigert and Kotz 338, '[i]n truth the legal scholars of the classical period were themselves legislators and the most powerful legislators in the country; once they had achieved a consensus among themselves they had an authority which European legal scholarship never possessed in its proudest days. This is no longer acceptable for the Islamic states of today are nationalistic, authoritarian, and committed to the progressive improvement of the common good'. Although, as is evident by the Arab Spring, their commitment to the 'progressive improvement of the common good' is questionable at best.

96 See for example, *The Quran–Arabic Text & English Translation* 2:43, 'And keep up prayer and pay the poor-rate and bow down with those who bow down'.

97 I use the term legal norm here in what it is internally understood to mean within Islamic jurisprudence.

98 This is a matter of dispute between the various schools of thought.

99 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 203.

that have been reasonably contested by esteemed jurists, no jurist can claim to have reached a conclusive and infallible declaration of what Islamic law requires in a particular situation. In the words of Hallaq,

> *Ijtihad*, one of the most salient elements and defining features of Islamic law, is just that, an opinion. It does not claim monopoly on jural truth, nor does it instigate any powers of enforcement. It is precisely here where the "law" of the Shari'a. the *ijtihad*ic opinion, differs fundamentally from the law of the modern state. Islamic law, from at least this perspective, is not law, in the modern sense, at all.[100]

Error, or the possibility of it, in Islamic jurisprudence is 'an inevitable fact of legal life'.[101] What helps in this matter is that Islamic jurists assert that well-intentioned errors in *Ijtihād* are rewarded by God.[102]

Secondly, not all Muslims can be *Mujtahids*. For, if that were the case, no unified legal system would exist;[103] as every single Muslim *Mujtahid* would

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100 Hallaq 110.

101 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*' 204.

102 Almaqdisī 457–477; Alfutūḥī 244–245; Aljūwayni 27–31; Alghazālī 352–361.

103 No unified Islamic legal system exists in the sense that a national legal system exists. Islamic law is an umbrella term that covers a range of different schools of thought. The *Sunnī* tradition has four main schools of thought. For an explanation of the nature of these schools, see Badr 189–190, 'The schools of Islamic law were not formal educational institutions or officially-sanctioned law-making bodies. They were rather groups of jurists each following a certain doctrine that can be traced back to a prominent pioneer of the second century of the Muslim era whose name the school carries. This is a situation unprecedented in other legal systems . . . How did that peculiar situation come to be in Islamic law? The explanation resides in the fact that Islamic society was a society based on the rule of law, long before this concept became a cornerstone of Western societies. Although everyone realized that the bulk of the rules of Islamic law was manmade, its pseudo-divine character was kept alive because it upheld and strengthened the supremacy of the law. Islamic law was rhetorically referred to as God's law and as such applied equally to the rulers and to their subjects. It was considered a norm higher than the will of the sovereign, contrary to what modern positivists would have us believe the law to be. It was therefore fitting that this higher norm be formulated and, as the need might arise, restated by an autonomous meritocracy, the body of jurists or *fuqaha'*, which was open to anyone who had acquired the necessary learning, who possessed the required intellectual and moral qualifications and was recognized as such by his peers and by the public.' Supremacy of the law is, therefore, one more characteristic of the Islamic legal system . . . the said schools of law do not constitute distinct legal systems as some earlier Western students of Islamic law chose to treat them. This approach may have been

adopt his own legal system as a result of his *Ijtihād*.[104] This is not, however, a normative Islamic stance. It is merely the reality that allowed the Islamic legal system to come into force and continue to exist. Just as not all people in England are lawmakers, not all Muslims are apt to be *Mujtahids*. This social fact allowed many to derogate their right to *Ijtihād* in favour of meeting other social demands. The Holy Quran affirms this by stating that only some people from each community are required to seek understanding of their religion.[105] The others, therefore, should strive to understand other sciences and perform other tasks that are of communal or personal benefit.

2.2.3 The Status of Ijtihād

The conventional view is that at some period around the ninth or tenth century the gates of *Ijtihād* were closed. The proponents of this view hold that Islamic jurists recognised that Islamic law's 'creative force' was 'exhausted', and *Ijtihād* was replaced with 'imitation' (*Taqlīd*).[106] Schacht believes that Islamic law's 'rigidity' and detailed elaboration was a cause for the closure of the gates of *Ijtihād* as it progressively narrowed and hardened Islamic 'doctrine'.[107] Schacht traces the genesis of the closure of the gates of *Ijtihād*,

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dictated more by considerations of convenience in restricting the field of research than by valid methodological considerations. The four schools represent together one integral system and in fact one often finds within the same school opinions so divergent that some of them are more akin to the prevailing opinion of another school than to the prevailing opinion of the school in the context of which they were expressed'.

104 For conditions that must be present in a *Mujtahid*, see Weiss, *The Spirit of Islamic Law*, 128–129; Almaqdisī 444–448; Alfutūḥī 241–242; Ibn Badrān, 368–374; Alghazālī 342–345; Alsuyūṭī 38–50. For a brief explanation of the Islamic jurist's role in *Ijtihād*, see Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 209–210. However, please note that these conditions are themselves a product of *Ijtihaād* and have therefore been questioned by some, Schacht 69–70.

105 See *The Quran–Arabic Text & English Translation* 9:122, 'And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people when they come back to them that they may be cautious?'

106 Coulson 80; Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 208, '[a]n explanation often given by Islamicists for this trend is that a point had been reached at which all essential questions of law had been thoroughly discussed, and further deliberation was deemed unnecessary, if not disruptive . . . the "closing of the gate of *ijtihād*" and the corresponding general shift to *taqlīd* was more an accident of history than a requirement of theory'.

107 Schacht 69.

> The first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed are noticeable in Shāfiʿī, and from about the middle of the third century of the hijra (ninth century A.D.) the idea began to gain ground that only the great scholars of the past who could not be equalled, and not the epigones had the right to 'independent reasoning'.[108]

Ijtihād, which was a right, was replaced by *Taqlīd*,[109] which was seen as a duty upon the 'imitator' (*Muqallid*) 'to accept and follow the doctrine established by . . . predecessors'.[110] Coulson states, '[a]n exaggerated respect for the personalities of former jurists induced the belief that the work of interpretation and expansion had been exhaustively accomplished by scholars of peerless ability whose efforts had fashioned the Sharīʿah into its final and perfect form'.[111] However, *Taqlīd* did not absolve Islamic jurists of continuing to expend intellectual efforts in the Islamic legal discipline; though, the intellectual effort was of a different nature. Coulson explains, '[f]rom the tenth century onwards the role of jurists was that of commentators upon the works of the past masters, and their energies were perforce expended in a scholasticism which on occasions attained a remarkable degree of casuistry'.[112] Under *Taqlīd*, doctrine was no longer derived directly from the primary sources, the Quran, *Sunnah*, and *Ijmāʿ*; rather, doctrine was derived from the recognised schools of thought, which were themselves a subject of consensus.[113] Weiss explains how *Taqlīd* operated,

> On the whole, however, a nonmujtahid mufti's chances of finding a precedent that fits the case at hand exactly are usually slim, and it is more likely that he will have to employ the method of extrapolation rather than transmission. At this point his work will be very much like that of a mujtahid except that his texts will be different. Whereas the mujtahid works with foundational texts, he will work with school texts; but

108 Ibid. 70.

109 For more on *taqlīd*, see Aljūwayni 95–98; Alfutūḥī 250–252; Almaqdisī 496–499. However, note that a minority of Islamic jurists forbid *taqlīd*, see for example Moḥammad Alshawkāni, *Alqawl Almufīd fī Adilat Alijtihād wa Altaqlīd* (ʾAbdulraḥman ʾAbdulkhāliq ed, 1st edn, Dār Alqalam 1396 AH).

110 Coulson 80; Schacht 71.

111 Coulson 81.

112 Ibid.

113 Schacht 71.

> interpretation of school texts entails the same methodological considerations as interpretation of the foundational texts. He will have to concern himself with the authenticity of the text he is working with, for example a fatwā or other kind of statement of a school mujtahid. Occasionally he will find contradictory statements from the same mujtahid, in which case he will have to establish the chronology of the statements to be sure he is working with the latest one (mujtahids, it should be noted, are free to change their minds[114]) or use principles of transmission criticism to rule out statements of unlikely authenticity. He must deal with ambiguity and general language, dispelling uncertainty to the best of his ability through reliance on contextual clues and usually settling in the end for what appears to be the probable intent of the mujtahid. Frequently, he will resort to analogical reasoning in order to make his text applicable to the case at hand.[115]

The interpretation of the preceding epigones of Islamic law became the new subject of interpretation, so while the preceding epigones interpreted the primary sources, their successors interpreted the epigones' interpretations of the primary sources. This view, advocating that the gates of *Ijtihād* were closed, is normatively opposed by some Islamic jurists,[116] and factually opposed by some contemporary academics.[117] Today, there are numerous Islamic law councils in virtually all Islamic countries, which nearly all perform some sort of *Ijtihād*, in various degrees, as they continue to try and meet the legal demands of modern society. In any event, as can be seen by Weiss's detailed explanation, *Taqlīd*, did contain an element of *Ijtihād*. In other words, it did involve interpreting sources of law, be it primary or secondary, for the purpose of deducing and discovering new legal norms to fit contemporary legal problems. In short, *Ijtihād* did not disappear. What happened was that the Islamic legal system had developed and passed its formative stage, and with that the role of the jurist had

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114 Alfutūḥī 246–247; Ibn Badrān, 383–386.

115 Weiss, *The Spirit of Islamic Law*, 135.

116 See Schacht 72. For example, see Alshawkāni, *Alqawl Almufīd fī Adilat Alijtihād wa Altaqlīd*.

117 See, for example, Wael Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 International Journal of Middle East Studies 3; Shaista P. Ali-Karamali and Fiona Dunna, 'The Ijtihad Controversy' (1994) 9 Arab Law Quarterly 238, 241–257.

evolved from systemising and rendering a methodological order to the legal system, to working from within a systemised and methodological legal system.[118]

A continuation of the *Ijtihād* as performed by the predecessors, the holistic *Ijtihād* necessary to form legal interpretive methods and legal schools of thought, would have left little room for developing micro-doctrine or 'black-letter law', which is essential to any legal system. Needless to say, the inherited methodological models and schools of thought are open to reformation, and have indeed been reformed and challenged internally and externally.[119] But an assumed systemised grounding is needed for any legal system to dedicate its attention, or a large proportion of it, to micro-doctrinal issues. This explanation does not at all deny that *Ijtihād* did play a lesser role and that the legal creativity of Islamic jurists did decline from the 10th century onwards; however, it did not stagnate or cease altogether.[120]

In fact many of the great and influential works in Islamic jurisprudence were compiled after the 10th century.[121] Alnawawī's *Majmūʿ* was compiled in 13th century,[122] Ibn ʿAbd Albarr's *Tamhīd*[123] and *Istithkār*[124] were compiled in the 11th century, Ibn Taymiyah's *Fatāwā* were delivered in the 13th and 14th centuries,[125] Almaqdisī's *Mughnī* was compiled sometime in the 12th and 13th century,[126] and Ibn Ḥazm's *Muḥallā* was compiled in the 11th century.[127] These are all great and voluminous compendia of Islamic law that have been compiled after the alleged gates of *Ijtihād* were shut. Other than Ibn Ḥazm's work, all the examples mentioned are of works that stem from one of the famous four schools of thought. Yet, that should not deflect attention from the fact that these works had a reasonable degree of impartiality and independence.

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118 For the stages of the development of the Islamic legal system, see Muṣṭafā Alzargā, *Almadkhal Alfiqhi Al'am*, vol 1 (3rd ed, Dār Alqalam 2012), 161–163.

119 An example of a relatively modern challenge to the schools of thought is found in Alshawkani's work (Alshawkani died 1834 AD). See Alshawkāni, *Alqawl Almufīd fī Adilat Alijtihād wa Altaqlīd*.

120 The term 'stagnation of Ijtihad' was used by Zweigart and Kotz, see Zweigert and Kotz 334.

121 These works are heavily relied upon today.

122 Yiḥyā Alnawawī, *Almajmoo'a Sharḥ Almohthab* (Dār Alfikr).

123 Yousef Ibn ʿabd AlBarr, *Altamhīd lima fī Almuwata'a min Alma'ani wal Asānīd* (Muṣṭafā Al'alawi & Moḥammad Albakri ed, Wizārat 'umoon Alawqāf wal Shu'ūn Alislāmiyah 1387 AH).

124 Yousef Ibn ʿabd AlBarr, *Alistihkār* (Salim ʿatta & Moḥammad Mu'awad ed, 1st edn, Dār Alkutūb Al'ilmiyah 2000).

125 Aḥmad Ibn Taymīyah, *Alfatāwā Alkubrā* (1st edn, Dār Alkutūb Al'ilimiyah 1987).

126 Ibn Qudāmah Almaqdisī, *Almughnī*, vol 6 (Maktabat AlQāhirah 1968).

127 ʿAli Ibn Ḥazm, *Almuḥallā Bil Āthār* (Dār Alfikr).

In sum, after the 10th century, *Ijtihād* did not cease to exist. The intellectual efforts of Islamic jurists were expended differently within formulated methodologies and legal schools of thought. Admittedly, this resulted in an increase in black-letter law at the expense of a decrease in creative and innovative holistic legal thought or methodological enquiry.[128]

The increased control of State law has further restricted *Ijtihād*.[129] As law is now controlled by the State, it is difficult for *Ijtihād* to fully revive and play an active legal role in national law without governmental support.[130] However, Kamali notes,

> This is, of course, not to say that the traditional forms of learning in the *Sharīʿah* disciplines, or of the practice of ijtihād, are obsolete . . . the contribution that . . . scholars can make, in their individual capacities, to the incessant search for better solutions and more refined alternatives should never be underestimated.[131]

Additionally, the fact that state control has relegated the position of Islamic law does not mean that Islamic jurists should 'stagnate' and allow *Ijtihād* to 'stagnate'. There are two important reasons for this proposition. Firstly, as delineated above, Islamic law is pervasive and all encompassing to all spheres of life. In spite of being a non-state law, Islamic law can still govern a lot of these spheres. A Muslim is still obliged to pray, fast, eat *Halal* meat, abstain from alcohol, and wed according to Islamic law etc. even if he resides in a secular country that is governed by a secular legal system. Therefore, *Ijtihād* is continuously needed to answer the novel legal questions that arise under these legal sub-disciplines. Secondly, Islamic jurists should continue to develop Islamic law, for a time may come where the application of its more 'legal' norms—legal, as understood by Western concepts of what law is, e.g. property laws—is highly sought. Accordingly, Islamic jurists must ensure that if and when that

128 Though holistic and methodological reformative attempts continued to be made. For example, see Coulson's discussion of 'Neo-Ijtihad' in Coulson 202–217. Also see, Kamali, 'Issues in the Understanding of Jihād and Ijtihād', 627–633. For earlier examples of epistemic independence, see Lucas.

129 Kamali, *Principles of Islamic Jurisprudence*, 494; Kamali, 'Issues in the Understanding of Jihād and Ijtihād', 626–627.

130 Kamali, *Principles of Islamic Jurisprudence*, 495.

131 Ibid.

time comes, the Islamic legal system is well equipped to answer the call made upon it.[132]

As the laws of *Waqf* are mainly a product of *Ijtihād*, the study of these laws is couched in the general discourse on the role of *Ijtihād*. If revamped, *Ijtihād* could be encouraged and performed in the laws of *Waqf*. If *Ijtihād* can reform *Waqf* laws while maintaining a close affinity to the Islamic legal heritage, then a stronger case could be made for the contemporary importance of the role of *Ijtihād* in developing Islamic law and generating legal norms.[133] If not, however, then serious questions must be posed about the efficacy of the classical Islamic interpretive methodologies, and, as a result, calls for holistic macro-doctrinal *Ijtihād*, such as the 'Neo-Ijtihad' described by Coulson, may be in order.

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132 Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihād*', 212, '*Ijtihād* may seem to have little effect on actual legal development in many Muslim countries, but as long as theory persists, the stage is always set for a possible reformation of existing law'.

133 In our age, Islamic jurists have used *Ijtihād* to try and reform and modernise *Waqf* laws. For example, Ibn Bayyah explored how the notion of necessity (*Maṣlahah*) can operate in reforming *Waqf* laws; see ʿAbdullah Ibn Bayyah, *Iʿmāl Almaṣlaḥa fī Alwaqf* (Mūʾassassat Alrayyāt 2005), 73, 'By induction, the general provisions of Islamic law and the specific provisions of *Waqf* law leave no room for doubt in saying that *Maṣlahah* is the correct concept with which to develop *Waqf* law' [my translation]. See also, Mājid Alʿumarī, *Aḥkām Alwaqf fī Ḍawʾ Almaṣāliḥ Almursalah: Dirāsah Fiqhiah Usūliah* (1st edn, Dār Alkhalīj Lilnashr wal Tawzīʿ 2010). For a very brief description of the operation of *Maṣlahah*, see Shihābaldīn Alzangānī, *Takhrīj Alfurūʿa ʿAlā Alusūl* (Nāgī Alsūwayd ed, Almaktabah Alaṣriyah 2010), 122–123, 'following *Maṣlahha* is following the general provisions and spirit of Islamic law, even if there is no specific provision on a particular issue. Events are infinite and specific legal provisions are finite, therefore the general provisions and spirit of Islam should be used to generate new norms' [my translation]. For the normative position of *Maṣlahah* in Islamic law, see Ibrāhīm Alshāṭibī, *Almuwafaqāt fī Uṣūl Alsharīʿah*, vol 1 (ʾAbdullah Darrāz ed, Almaktabah Altijāriyah Alkubrā), 139.

CHAPTER 1

Methodology and General Difficulties

1 Comparative Legal Methodology

The main purpose of this book is to compare aspects of English trusts law and Islamic *Waqf* law. This section will be devoted to the discussion of comparative legal methodology, which will be the legal research methodology adopted in this book.

Contact between nations, such as 'economic and commercial contacts', generates interest in comparative law.[1] Grubb notes that there is an 'increasing necessity of comparative law in a world where physical and legal barriers are breaking down'.[2] Some have even described comparative law as 'fashionable'.[3] Comparative law has even been equated with 'traveling', where one breaks away from routines and meets the 'unexpected' and 'unknown'.[4] Whereas with traveling, one must actually travel to see the foreignness; in law, sometimes, one does not have to look beyond one's own legal system to see foreign influences.

All legal systems are open to 'foreign influences', British legislation and English law are no exception,[5] and, therefore, comparative law can always

1 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (Weir T tr, 2nd edn, Clarendon Press 1987), 58.

2 Catherine Grubb, 'The Implications of Postmodernism on Comparative Methodology' [2003] UCL Jurisprudence Review 13, 16.

3 O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 1.

4 Gunter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International Law Journal 411, 411.

5 Interestingly, for our purposes, some have even argued that the English trust was inspired by the Islamic *Waqf*. See Monica Gaudiosi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College' (1988) 136 University of Pennsylvania Law Review 1231. However, note Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26 American Journal of Comparative Law 187, 193, 'when venturing into the field of historical comparison between legal systems we should avoid jumping to the conclusion that of the two legal systems under study the later in date has necessarily borrowed from the earlier'; see also Paul Matthews, 'From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust' in D.J. Hayton (ed), *Extending the Boundaries of Trust and Similar Ring-fenced Funds* (Kluwer Law International 2002), 2, 'although similar pressures in different places (and times) may lead to legal solutions which resemble one another, that does not inevitably mean that the first of them to appear must be

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shed light into how these foreign influences played their role in shaping the law as we know it.[6] Moreover, one does not have to look beyond one's indigenous legal system to see comparative workings. Comparison is in the nature of all legal work, and, even more importantly, it is an important constituent of 'human thought'.[7] Comparison is inevitable; it 'is a fundamental principle of legal research'.[8] All claims legal researchers or lawyers make are 'implicitly or explicitly . . . set against another situation'.[9]

Yet, comparative law, as a separate legal discipline, is distinctive because it entails reconstructing the meaning of foreign rules.[10] What also makes comparative law distinctive is that it is not only the study of 'foreign' laws; rather, it is the study of 'foreign' law within a 'conceptual framework' that has been constructed for the simultaneous study of a multiplicity of systems where each system does not necessarily share the same 'epistemic' view of law.[11] By looking at laws outside of their indigenous setting, one immediately takes them out of the context in which they normally operate. Not only that, but one would also look at a particular law with his own prejudices and personal legal background. For example, a common lawyer might view a conventional family *Waqf* as a legally repugnant wealth-planning structure as it offends the rule against perpetuities. A true comparatist must at first rise above this and seek to understand 'foreign' laws within their context, suspending judgments based on personal experience and heritage. Only after such an understanding is achieved may one begin the process of reconstructing the 'foreign' law, drawing on his own legal system. It is at this point where we, as comparatists, learn most.

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the parent of (or even related to) the other or others'. With regards to the issue of trust being influenced by the laws of *Waqf*, Badr holds, 'it is safer here also to ascribe the similarities between *waqf* and trust to an independent similar treatment of a very similar problem'.

6 Kahn-Freund 2.

7 A. Kh. Saidov, *Comparative Law* (William Elliott Butler tr, Wildy, Simmonds and Hill Publishing Ltd 2003), 33.

8 Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart Publishing 2011), 229.

9 Ibid.

10 Ibid. 239.

11 Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart Publishing 2011), 210. Above, I briefly demonstrated the different epistemic viewpoint Islamic law has of what constitutes law.

1.1 *Definition*

According to Zweigert and Kotz, the words 'comparative' and 'law' 'suggest an intellectual activity with law as its object and comparison as its process'.[12] Saidov adds, '[t]he term "comparative law" has a triple meaning: a method, a science, and an instructional discipline'.[13] Juxtaposing the different laws of two legal systems is 'just a preliminary step'; the comparative process 'is the most difficult part of any work in comparative law'.[14] In addition to comparison, one has to explain, using his conceptual framework, why legal systems are different.[15] Frankenberg states, '[u]nless we assimilate what we get to know to what we know already and accommodate what we know to what we get to know, we merely accumulate information'.[16] The marriage of the comparative and analytical process is what ensures continuity of the comparative legal scholarship; it is what allows later researchers to build on previous models and findings.[17]

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12 Zweigert and Kotz, 2; George Mousourakis, *Perspectives on Comparative Law and Jurisprudence* (Pearson Education 2006), 33, 'comparison is a mental process where two or more different objects (i.e. different in quality, quantity or kind) are examined to determine their possible relationships'.

13 Saidov 15.

14 Zweigert and Kotz, 41. See also p. 46, 'In fact the comparatist is in the best position to follow his comparative researches with a critical evaluation. If he does not, no one else will do it, and if no one does it, comparative law will deserve BINDER's sour description of 'piling up blocks of stone that no one will build with'; p. 66, 'the meat of comparative law is not positive law but critical comparison'.

15 Grubb 18.

16 Frankenberg 413.

17 See Arthur Von Mehren, 'An Academic Tradition for Comparative Law?' (1971) 19 American Journal of Comparative Law 624, 624, 'Though much excellent scholarship has been achieved, no shared body of information and theory, no scholarly tradition susceptible of transmission to succeeding generations has emerged. One has the uneasy feeling that comparative-law scholarship is always beginning over again, that comparatists lack a shared foundation on which each can build'; Grubb 29, '[f]or comparative law to become a stable and advancing academic discipline, the units for comparison need to be clear, so that different studies can themselves be compared and built upon'. Also see ibid. 41–42, 'it is impossible to create a universal method of comparative law. In order to make a comparative law more coherent we have to resort to either agreeing on a single method of comparison or guidelines need to be created to explain how a method should be developed . . . In order to increase coherence within the discipline (for comparative studies to be comparable themselves and for those studies to be built upon) it is suggested that comparativists should explain their procedure'.

1.2 *A Brief History, Aims, and Functions of Comparative Law*

Zweigert and Kolz assert that comparative legal research could be found as early as in ancient Greece.[18] In modern times, comparative law came to the fore in Paris in 1900.[19] Founded by Eduard Lambert and Raymond Saleilles, the International Congress for Comparative Law's main goal was to create a *droit commun de l'humanité*, a 'common law of mankind'.[20] This ambition was wrecked by the world wars.[21] However, the increasing uniformity of the global cultural environment is in turn reducing the barriers to legal uniformity, on some levels at least. Kahn-Freund explain,

> In all industrialised countries the legal problems arising from employment have become as similar as those arising from housing: the blocks of flats in which so many people live look very much alike in Manchester or Leningrad, in Cincinnati or Buenos Aires, in Yokohama or in Dusseldorf. And the assimilation of economic conditions has been paralleled by the growing uniformity of the cultural environment-not only through the diminishing role of religion in people's lives but also through the central place occupied by the mass media . . . everywhere people read the same kind of news-paper every morning, look at the same kind of television pictures every night, and worship the same kind of film stars and football teams everywhere? Industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation-and nothing has contributed more to this than the greater ease with which people move from place to place.[22]

Comparative law 'has no immediate aim', yet, it 'procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma'.[23] On the theoretical level, comparative law aims at illustrating how legal systems are similar or different.[24] On the 'applied' level,

18 Zweigert and Kotz 48. For the history of comparative law, see pp. 48–62; Saidov 16–20 & 48–86; Walther Hug, 'The History of Comparative Law' (1932) 45 Harvard Law Review 1027, Hug's study is confined to Europe and America; Neville Brown, 'A Century of Comparative Law in England: 1869–1969' (1971) 19 American Journal of Comparative Law 232; Mousourakis 17–32.

19 Zweigert and Kotz 2.

20 Ibid. 3; Grubb 18.

21 Zweigert and Kotz 3.

22 Kahn-Freund 9.

23 Zweigert and Kotz 3.

24 Ibid. 11–12.

'comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances'.[25]

Comparative law has various functions. It can be a 'tool' of legal construction.[26] As detailed by Kahn-Freund above, comparative law is also about solving 'common problems faced by different legal systems'.[27] Comparative law can contribute to the 'harmonisation' of law,[28] or to its 'systemic unification'.[29] It shows up 'the emptiness of legal dogmatism . . . because it is forced to abandon national doctrines and come directly to grips with the demands of life for suitable rules'.[30] According to Pound, comparative legal research presents us with important 'raw material' that sets the ground for 'creative lawmaking'.[31] Importantly, studying comparative law makes us appreciate 'the possibilities of our own legal materials'.[32] Grubb notes, '[t]he new dimension offered by comparative law may also promote understanding of one's own legal system and equip a person with added tools and ideas for criticism of their own system'.[33] Ellis adds that comparative law 'serves to remind jurists that our own traditions are particular as opposed to universal, representing just one out of many possible approaches to law and legal thought'.[34] The comparative study of law can also serve some empirical functions.[35] Finally, the study of comparative law can help us gain more insight on sociological or socio-legal problems, Abel states,

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25 Ibid. 12.

26 Ibid. 15; Mousourakis 9–10.

27 Grubb 32.

28 John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), 157–158; Saidov 16.

29 Zweigert and Kotz 15. See also p. 23, 'Unification cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones'.

30 Ibid. 30; Mousourakis 8. For the academic and epistemic benefits of studying comparative law, see Von Mehren 626–629.

31 Pound 15.

32 Ibid.

33 Grubb 17.

34 Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 European Journal of International Law 949, 965.

35 Saidov 23.

> If the formulation of generalizations about human behavior is the goal, the advantage-indeed the necessity-of comparison becomes clear. Comparison, whether spatial or temporal, allows us to measure differences in the values of our variables-an essential step in formulating and testing hypotheses.[36]

1.3 *General Thoughts on the Comparative Method*

The comparative legal method[37] is still at the experimental stage and it is difficult to lay down a detailed method.[38] Grubb maintains, '[c]omparative law has . . . been unable to form itself into a systematic and cumulative academic discipline . . . This has been largely attributed to a lack of coherence of method'.[39] Adams says, 'it is impossible to speak of *the* methodology of comparative law: trying to find a methodology for something that is not a question—such as 'comparative law'—is not of any service'.[40] Therefore, Adams concludes that 'comparative law is a collection of methods that may be helpful in seeking answers to a variety of questions about law'.[41] This multiplicity of methods is a distinctive feature of comparative law.[42] As put by Husa, 'legal pluralism can be met with methodological pluralism'.[43] It might

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36 Richard L. Abel, 'Comparative Law and Social Theory' (1978) 26 American Journal of Comparative Law 219, 220.

37 See Saidov 20, Saidov differentiates between the terms 'comparative law' and 'comparative method', "One should note a certain ambiguity between the definitions of the "comparative method" and "comparative law". It is hardly correct to treat them as identical and use them as synonyms, as is sometimes done. The comparative method should never be called "comparative law". The concept of the "comparative method", that is, the means of cognition of State-legal phenomena, can not have the same meanings as the concept of "comparative law"—a scientific orientation studying the principal modern legal systems. To be sure, if both these concepts coincided, then comparative law could not become a relatively autonomous scientific discipline'.

38 Zweigert and Kotz 20.

39 Grubb 13.

40 Adams 236.

41 Ibid. 236.

42 Juha Karhu, 'How to Make Comparable Things: Legal Engineering at the Service of Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004), 79.

43 Husa 228. Also see Frankenberg 426, 'Comparatists have done their work in a variety of spirits, reaching from noble humanism to straightforward instrumentalism. They have compared the law as philosophers and historians, as lawyers and social engineers, and some even as social scientists. The heterogeneity and vastness of the subject matter

help to view comparative legal methodology not as a distinct airtight method in its own right, but as an umbrella term for an approach that uses the 'entire methodological arsenal and instruments of legal science'.[44] Some have even described comparative law as encompassing any research that is done outside domestic law's boundaries.[45]

However, although the comparative methodological pluralism does have creative and innovative tendencies as a result of its lack of rigidity and narrowness, some have lamented the lack of uniformity in the comparative method. Von argues that if more attention were paid to refining a uniform comparative method, the scholarship would have 'a greater cumulative effect'.[46] The lack of a uniform method has made it difficult for present researchers to build on past work, as it is methodologically incoherent. The discussion on refining or unifying the comparative method is beyond the scope of this chapter. Nonetheless, some brief thoughts could be spared on this matter.

What Von Mehren laments is the fact that comparative legal scholarship does not have a sufficient cumulative effect. The question that must be answered is why is such a cumulative effect desired? What is the reason behind this instrumental view of legal scholarship? Why must scholarship be 'driven' in a specific direction? The more rigid the method, the less innovative and creative those employing the method can be. Refining a uniform method is constraining future researchers in how they can say what they have to say, and that can also effect what they have to say. Surely, a balance must be struck between legal scholarship continuous coherence—which is necessary if legal scholarship were to have any general impact—, and researchers independence. If a research method is too rigid, then new research will be less innovative and more repetitive because of the many restraints imposed on the researcher. If, however, the researcher was completely free and oblivious of the

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dooms any attempt to render a detailed picture of the past and present of comparative law to failure'.

44 Saidov 23. See also p. 38, '[n]one of the methods in practice operate in pure form; they always are interlinked, intertwined, with other methods'.

45 Hug 1027.

46 Von Mehren 631–632, "Pleas for a core tradition and discussions of a basic course are not intended to set limits to the comparative enterprise. The argument is simply that if comparatists shared a larger body of information and a common training in basic methodological problems, work in every area of comparative endeavor would proceed more surely and with greater cumulative effect . . . Discourse beginning with a shared body of information and material is normally more productive than the exchange of ideas that cannot be tested with a touchstone held in common'. See also Grubb 13–14.

methodological demands of legal scholarship, then his research may not fit within the context of legal scholarship.

Perhaps no uniform method is associated with comparative law because no uniform method is possible. After all, the comparative possibilities are endless, and so are the languages, cultures, and social circumstances laws exist and *can* exist in. What can and should be expected, nevertheless, is that comparatists focus more on elaborating their methodology before embarking upon comparative work. This may aid in fostering continuity of scholarship, but, above all, it will shed light into why a particular comparatist has chosen to undertake a comparative study. This, as many comparatists know, is an easy question to pose but a challenging one to answer. If answered appropriately, a response to this question will add value to almost any comparative work.

1.4 *The Comparative Method Employed in this Book*

1.4.1 Models for Comparison

The choice of models to compare depends on one's research topic.[47] According to Von Mehren, 'no subject matter and no legal system can, on *a priori* grounds, be excluded as beyond the domain of comparative law. The only requirement is that the material studied be compared-that is to say, approached in the context of two or more different legal orders'.[48] In other words, one should consider whether the models considered are 'comparable'. [49] Where a legal tradition is widespread, such as the common law that is adopted by almost a third of countries nowadays, one does not necessarily have to study all the common law jurisdictions to make an assessment of the common law. [50] One 'can generally limit himself to the parent systems of the great legal families'. [51] Therefore, in this book, the analysis of the law of trusts is primarily based on English law, as it is the parent of the common law system.

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47 Zweigert and Kotz 39.

48 Von Mehren 624; Mousourakis 43, 'One can reasonably argue that all contemporary legal systems are to a considerable extent comparable with each other, as they deal with largely the same or similar problems occurring in daily life. It is most unlikely that there are human societies in the world today that are different to such an extent that their legal systems may be regarded as entirely incomparable. There are, however, legal rules governing situations that arise only in societies that have reached a certain level of development or have adopted a particular political and economic system . . . Such rules often lack comparable counterparts outside the socio-economic and political systems in which they operate'.

49 Mousourakis 35 & 37.

50 Zweigert and Kotz 227.

51 Ibid. 39.

However, the multiplicity of jurisdictions in Islamic law is of schools of thought, not of national legal systems.[52] As no school can be thought of as the 'parent' of Islamic law, no school can be given precedence on that basis. Consequently, as this research will involve searching for Islamic legal hermeneutic stances that are most reconcilable with English common law, the Islamic law model will not be confined to one school of thought. The four main *Sunnī* schools of thought will be examined.

In sum, the models chosen in this book are English common law and Islamic law as comprised by the four main *Sunnī* schools of thought. Both models have a 'fully developed legal scholarship'.[53] Von Mehren advocates that focus should be on areas of law that best capture 'the operations of the system's intellectual ordering and of its institutional structures'.[54] As shown above, *Waqf* satisfies this as it can be used to illustrate the workings of *Ijtihād*. In addition, the trust is seen as the greatest 'invention' of equity; it 'is an 'institute' of great elasticity and generality; as elastic, as general as contract'.[55] Maitland believes that it is 'the most distinctive achievement of English lawyers'.[56] Austin Scott explains why the invention of the trust was so distinctive,

> It was chiefly by means of uses and trusts that the feudal system was undermined in England, that the law of conveyancing was revolutionized, that the economic position of married women was ameliorated, that family settlements have been effected, whereby daughters and younger sons of landed proprietors have been enabled modestly to participate in the family wealth, that unincorporated associations have found a measure of protection, that business enterprizes of many kinds have been enabled to accomplish their purposes, that great sums of money have

52 Different Islamic nations adopt different schools of thought. For example, Saudi Arabia follows the *Ḥanbalī* school of thought, while Morocco adheres to the *Mālikī* school of thought. However, the legal systems of the two exemplified countries are not exclusively *Ḥanbalī* or *Mālikī*. Much of the laws in the two legal systems are secular and not based on Islamic legal doctrine. The same goes for all Islamic countries. That is why a national legal system of an Islamic country cannot be used as a model for Islamic law when undertaking comparative legal research; though, elements of such legal systems can be used to exemplify living manifestations of Islamic law.

53 Von Mehren 630, he believes that a 'fully developed legal scholarship' is an integral consideration for choosing a comparative model.

54 Ibid. 631.

55 F.W. Maitland, *Equity: A Course of Lectures* (Reissue edn, Cambridge University Press 2011), 23.

56 Ibid.

> been devoted to charitable enterprizes; and by employing the analogy of a trust, by the invention of the so-called constructive trust, the courts have been enabled to give relief against all sorts of fraudulent schemes whereby scoundrels have sought to enrich themselves at the expense of other persons.[57]

Importantly, the close resemblance of *Waqf*s and English trusts 'makes it a perfect subject in order to explore the interaction between Islamic law and English law'.[58] Trusts and *Waqf*s exhibit, as has been shown, the heist of both models intellectual and innovative propensities. As both trusts and *Waqf*s are largely innovative institutions,[59] they should, theoretically, be more open to innovative reform and reconciliation.

1.4.2 Method of Comparison

While there are many methods of comparison, for the virtue of brevity, this section shall only discuss those relevant to this book. The book will involve elements of 'macrocomparison' and 'microcomparison'. 'Macrocomparison' compares 'the spirit and style of different legal systems'.[60] 'Microcomparison' compares 'specific legal institutions or problems'.[61] Twining believes that macrocomparison and microcomparison are 'complementary rather than alternatives'.[62] The reason for choosing to use 'microcomparison' is obvious, as the specific legal institutions of trusts and *Waqf*s will be studied. 'Macrocomparison' is also necessary as ascertaining the spirit and style of legal systems can aid in formulating fresh interpretations that are in line with the legal system's style and spirit.

This book will also use the method of functional comparison.[63] Saidov defines functional comparison as 'the investigation of legal means and

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57 Austin Wakeman Scott, 'The Trust as an Intrument of Law Reform' (1922) 31 Yale Law Journal 457, 457.

58 Muhammad Zubair Abbasi, 'Sharī'a under the English Legal System: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law' (DPhil thesis, St. Hilda's College, Faculty of Law, Oxford University 2013), 49.

59 I explained above that the Islamic *Waqf* is largely the product of *Ijtihād*. That is what makes it distinctively innovative.

60 Zweigert and Kotz 4; Grubb 27; Saidov 41; Mousourakis 34.

61 Zweigert and Kotz 5; Grubb 28; Saidov 41; Mousourakis 34.

62 William Twining, *Globalisation & Legal Theory* (Cambridge University Press 2000), 184, quoted in Grubb 28.

63 Also known as functionality or functionalism. I use these terms interchangeably.

methods for the resolution of similar or identical social and legal problems by different legal systems'.[64] Zweigert and Kotz elaborate,

> Comparative lawyers have long known that only rules which perform the same function and address the same real problem or conflict of interests can profitably be compared. They also know that they must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover 'neutral' concepts with which to describe such problems or conflicts of interests.[65]

Functionalism assumes that all societies face the 'same problems' but solve them by different means, most often with similar results.[66] Therefore, the idea is that 'universal principles of law can be discovered by working towards them through the function or purpose of legal rules'.[67] Grubb explains how functionality is reached: 'the problem must be stated without any reference to the concepts of one's own legal system'.[68] This could take the form of extracting the legal principles behind the two comparable laws.[69] After extracting the legal concept, one can determine which law is more effective at realising the principle behind it. The inference behind functionalism is that if legal systems do not solve the same problem, or serve the same function, then they cannot be compared.[70]

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64 Saidov 44.

65 Zweigert and Kotz 11. For a brief history of the development of functionalism, see Husa 212–216.

66 Zweigert and Kotz 31. This does not generally apply to all legal sub-disciplines, see p. 36. 'if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively "unpolitical", we find that as a general rule developed nations answer the needs of legal business in the same on in a very similar way'.

67 Ellis 959.

68 Grubb 32.

69 Pound 13.

70 Zweigert and Kotz 42. This is also a 'socio-legal' analysis requirement, see p. 44, 'Comparative law is thus closely in tune with current trends in legal science when it asks what the function of legal institutions in different countries may be, rather than what their doctrinal structure is, and when it orders the solutions of the various systems upon a realistic basis by testing them for their responsiveness to the social needs they seek to fill'.

Functionalism has been fiercely criticised by a number of comparatists. The first criticism is the postmodern one. It is based on the idea that comparatists, as humans, will always end up projecting their preconceived ideas of law—that are based on their indigenous legal system—into the foreign legal system they study.[71] Watson states, '[l]aw operates, or should operate, on the basis of social reality, but it is the product of human imagination. Often reality and imagination do not mesh'.[72] Postmodernists have asserted that 'the imposition of one's own conceptions is unavoidable'.[73] What follows is that comparatists can neither make 'objective observations', nor 'understand another legal system as their outlook has already been shaped by the experiences of their own legal system'.[74]

Moreover, some have criticised the essence of functionality, questioning whether functionality can lead to purposeful comparison. Grubb notes, '[i]n certain circumstances the hypothesis that all societies face the same problems can only be true on the most general level, which may not yield a fruitful comparison'.[75] Others have even doubted whether functionality can be achieved. Ellis states, 'doubts have arisen regarding the possibility of isolating the essence of a legal rule'.[76] Ellis believes that rules are not simply there to solve problems but are also part of the 'broader culture', and are therefore manifestations or expressions of cultural identity.[77] The problem with functionalism, according to Frankenberg, is that it 'has no eye and no

71 Grubb 38; Adams 233–234, 'even 'just' studying a foreign legal system will unavoidably, albeit implicitly and maybe even unconsciously, cause jurists to refer to and reflect on their native legal system . . . It is this very propensity which can be highly hazardous because it may all too easily result in the other legal system being described or analysed within a framework which is characteristic of the researcher's own legal system (ethnocentrism!). The lack of acknowledgement and consideration of this fact often brings on misguided, misleading or erroneous conclusions, steering the research into the direction of the search for similarities rather than similarities *and* differences'.

72 Alan Watson, 'Legal Culture v Legal Tradition' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004), 1.

73 Grubb 22–23; Frankenberg 455, 'whatever our comparative paradigm and neutral referent may be—we look upon, compare and judge the world against the standard of our own satisfaction'.

74 Grubb 22–23.

75 Ibid. 38.

76 Ellis 959.

77 Ibid. 962.

sensitivity for what is not formalized and not regulated under a given regime'.[78] Frankenberg elaborates,

> The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificially universal typology of 'solutions.' In this way, 'function' is reified as a principle of reality and not taken as an analytical principle that orders the real world.[79]

78 Frankenberg 438.

79 Ibid. 440. Also see pp. 413–415, 'The risks are that in integrating knowledges we will level the new in the hard-worn categories of the old or that in looking too hard for the new we will abandon the stability and prudence embodied in the old's normative vision or keep the new and old separate and not allow ourselves to learn the lessons of each . . . Learning does not require us to sell out what we know to any novelty or just to enlarge the quantity of the knowledge we store, but to review and transcend both . . . I suggest that the dialectic of learning requires at least two operations that prevent the old categories and way from being merely projected onto the world and that allow the new to speak for itself. These operations I call "distancing" and "differencing." Distance is needed to gain a vantage on who we are and what we are doing and thinking. Distancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance. Distance de-centers our world-view and thus establishes what might be called objectivity. Mere distance, however, neither opens our eyes nor makes us see clearly . . . In order to break the unconscious spell that holds us to see others by the measure of ourselves without abandoning the benefits of criticism, traveling as well as comparison has to be an exercise in difference. By differencing we not only develop and practice a sharp sense for diversity and heterogeneity but, more importantly, we make a conscious effort to establish subjectivity, that is, the impact of the self, the observer's perspective and experience, is scrupulously taken into account. Differencing calls into question the neutrality and universality of all criteria; it rejects the notion . . . that the categories and concepts with which new experiences are grasped, classified, and compared have nothing whatsoever to do with the socio-cultural context of those who see in terms of them. Differencing is necessary to prevent the observer-compararist from confusing the present content of (Western) ideas and concepts with the criteria of a universal truth and logic. By the same token, however, recognition of subjectivity threatens the objectivity of an observation, analysis or comparison . . . Distancing and differencing oblige the comparatist to embark upon an intellectual enterprise which appears to be (yet is not) paradoxical. This enterprise begins with a critique of the rationalist assumption that comparison along the lines drawn by the cognitive patterns of "our" Western (or, for the matter, "their" Eastern) culture is objective if only guided by a neutral referent, such as the idea, development or function of law. The enterprise moves on to a critique of the skeptical assumption that objective comparison is impossible because the compararist's vision is totally determined by her specific historical and social experience and perspective. Comparative Legal Studies that are critical in this double

In response to the criticism of functionalism, some comparatists, such as Ellis, have adopted another type of functionalism that is more instrumental in nature.[80] The interest is focused more on how the law 'meets social needs' as opposed to how two laws compare in their function.[81] This approach is more useful in establishing the efficacy of the comparable rules in meeting common desired social goals. A desired social goal could be set as a benchmark and then each legal system's efficacy can be measured against that benchmark.

Although functionalism has faced much criticism, it is still the mainstream comparative legal methodology.[82] Its fiercest critic is postmodernism. The postmodern objection does not necessarily have to be rebutted; it has to be acknowledged. Frankenberg says, '[w]hile the self, our cognitive history and its baggage of assumptions and perspective, cannot be disposed of at will, we can still try to honestly and consciously account for it, exposing it to self-critical re-examination'.[83] Moreover, the misunderstanding of foreign laws that results from our own foreignness to those particular laws is not necessarily always bad, for 'misunderstanding can be productive and inspiring'.[84] The postmodernist theory may question whether comparative law could be done at all.[85] Nevertheless, postmodernism is not exempt from critique on its own terms; was the idea that one cannot let go of preconceived notions unprejudiced in any way?

In any event, as functionalism is still the mainstream comparative legal methodology and because this book is essentially comparing the function of wealth-planning, which is realised by both trusts and *Waqf*s, functionalism is integral to this book's methodology. The functionalism that will be employed in this book does have an instrumental underpinning. Precisely, the book will look into how trusts and *Waqf* laws can be reformed to better meet their functional purposes (i.e. wealth-planning). To do so, hermeneutic methods of interpretation must be used to find or formulate reconciliatory and reformatory interpretations.

Bell defines interpretation as the act of bringing 'the text forward, out of its original context and into the present situation to which it is to be applied'.[86]

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sense may not solve the perennial problem of how to understand other peoples' ideas and activities truly or rationally. Yet, critical comparisons claim to elucidate the path of a dialectical learning experience involving the self and the other'.

80 Ellis 960.

81 Ibid.

82 Husa 214.

83 Frankenberg 443.

84 Ibid. 445.

85 Grubb 23.

86 Bell 165.

In a hermeneutic method of comparative interpretation, the interpreter 'tries to explain what the law looks like from the point of view of a member of the group which accepts and uses the [legal rules] as a guide to conduct'.[87] What makes this process comparative is the occurrence of a 'double interpretation'; as in addition to hermeneutically interpreting the foreign legal system, one always reflects on and re-interprets his native legal system.[88] To achieve the greatest degree of internality possible, a modern comparatist is required to master the language of the foreign system so that he may refer to the indigenous sources of law and indigenous commentaries.[89] Also, not only must the comparatist read the foreign law as a native lawyer to that system, he must also be able to write about that foreign law in a way that a native lawyer can recognise. Husa notes, 'if a lawyer cannot recognise what is presented as law from his or her own system by the comparatist, then something has gone badly wrong in the process of comparison'.[90]

Finally, as the common fruit of comparative legal research is the transfer or transplant of law from one model legal system to another, or, at least, the suggestion of a transplant, this section will be concluded with a brief discussion of the method of assessing the transferability of norms between Islamic law and the common law. Although Orucu holds that legal rules are capable of settling 'in various places',[91] this statement cannot be left without qualification. Khan-Freund asserts, 'we cannot take for granted that rules or institutions are transplantable . . . any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection'.[92] In religious law, the risk of rejection is even higher. Badr explains,

> the strong link between religion and law in Islam and the need to keep all the man-made rules of *Mu'amalat* in line with the guiding principles of the *Qur'an* and the prophetic tradition, or more correctly to avoid all

87 Ibid. 158–159 & 174. See also pp. 167–168, 'If a statement of what the law of a particular jurisdiction is the subject of internal controversy, then comparative lawyers have to be doubly careful . . . A comparison will therefore typically require an interpretation, a rational reconstruction, of both the comparative lawyer's own national law and of the foreign system . . . Treating the other legal system with respect allows the comparatist to be the voice of that system, albeit with a non-native accent.'

88 Ibid. 171.

89 See Husa 210.

90 Ibid. 228.

91 Esin Orucu, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff Publishers 2004), 101.

92 Kahn-Freund 27.

> conflict between the two, would have been strong deterrents from borrowing the concepts or rules of an alien legal system even had it been accessible to the early Arab jurists.[93]

In addition, cultural and religious pride, as well as intellectual impartiality, imparts that a legal solution should not be preferable by the very virtue of it coming from the First World.[94] This does not mean that Islamic law cannot borrow legal solutions from other systems; more precisely, a foreign legal solution must first be internally justified from an Islamic perspective before it can be accepted into the Islamic legal system. Watson elucidates,

> Borrowing is only part, though perhaps the most obvious, of the conjunction of legal culture and legal tradition. The other part is the search for justification within one's own legal system. The search, cultural as it is, is inevitably backward looking whether it is for judicial precedent or juristic doctrine.[95]

As this is the case, the methodological path taken in this book regarding the transferability of norms between the two comparable models is as follows. It is not sufficient merely to compare the functionality of comparable norms of the two chosen models in pursuit of transplanting to the less advantageous, the more advantageous or successful legal norm in achieving its functional objective. A mere mechanic transplant does not take into account the internal validity tests legal norms need to overcome in order to be properly appropriated into a legal system. Therefore, a further stage in the process is suggested. After comparing the functionality of two comparable norms and ascertaining whether one can benefit from the other, that benefit, which, of course, takes the form of a legal directive, must be put to an internal validity test.

This can happen in one of two ways. First, if the legal system is one that already embeds a heterogeneity of traditions (such as Islamic law with its schools of thought), then the new function gleaned from the external comparable norm must be sought from the array of traditions that already internally exist in that legal system. To this end, 'Intra-family comparison' will be used between the Islamic schools of thought.[96] Such an approach could also be applied with regard to legal families. So, for instance, if a civilian concept

93 Badr 193.

94 Frankenberg 454–455.

95 Watson 3.

96 Saidov 40, he used the term 'Intra-family comparison'.

were to be transplanted into English law, an effort would be made to locate this concept from within the wider common law family (e.g. US law). The reason for this is that, as many concepts are already shared within a legal tradition or family, jurists will find it easier to appropriate legal concepts from within their own wider legal tradition or legal family. Legal traditions and families will also often use similar terminology for comparable functions and, in many cases, they will even be in the same language.[97]

Second, if the wider legal tradition or family does not embed the external legal concept (or something similar to it), then the external legal concept must be sought and developed anew using the legal systems internal interpretative or hermeneutic method. So, in the case of Islamic law, it must be sought using *Ijtihād*. In secular legal systems, such as common law systems, this may perhaps take form of legislation after parliamentary debate.

If neither the first nor the second solution is viable, and the need for appropriating an external legal concept is compelling, then the external legal concept may be imported with an important caveat. The external or foreign legal concept or norm must not infringe existing internal public policy considerations, for a legal system must only be developed in pursuit of its public policy objectives. If those public policy objectives are internally questioned, then that is a different matter.

To summarise, the book will employ both 'macrocomparison' and 'microcomparison' methods. Additionally, functionalism will be utilised to analyse the extent to which the law of trusts and the law of *Waqf*s meet their functions of wealth-planning for private purposes. Both laws will be interpreted hermeneutically and I will internally justify any attempts to transfer norms between the two systems in the process outlined above. All this will be undertaken bearing in mind that the objective is to give Muslim investors the opportunity to plan their wealth in the UK in a way that does not stain their conscience, religiously speaking.

2 General Difficulties

Some of the general difficulties that a book of this scope would encounter have been discussed above. The array of other difficulties that could arise is unpredictable, but some are more immediately conceivable than others. To this end, two general difficulties must be born in mind throughout this book. The first

97 For example, most of the major works in Islamic law across the four main schools of thought are written in Arabic.

difficulty is some legal researchers' scepticism towards Islamic law. The second difficulty is the scepticism from proponents of Islamic law towards non-divine law, or even comparative law.

It is evident that there are Western legal researchers, and even some Muslims,[98] who are sceptical of Islamic law. Schoenblum, for instance, believes that Islamic law 'can no longer efficiently serve the interests of consumers'.[99] Sir Roland Knyvet Wilson, a famous colonialist Islamic law commentator, even questioned whether Muslims themselves would want to apply Islamic law in the twentieth century, implying that it is out-dated.[100] Makdisi describes how some US judges associate Islamic law with 'a total denial of the law',

> The characterization of Islamic law is commonly accepted among Islamists, but a strange and mistaken image of the Islamic judge (*qadi*) persists in American legal circles. U.S. judges have offhandedly used the term *qadi justice* to symbolize a total denial of the law, namely, unprincipled, expedient and arbitrary lawmaking.[101]

In his study of Sanhuri's comparative work,[102] Shalakany admits that some Arab lawyers view comparative law as a 'traumatizing discipline'.[103] This is because they associate it with 'the loss . . . of authenticity from the Arab legal system'.[104] This view was largely formulated as a result of Sanhuri's work. Shalakany articulates the negative view of Sanhuri's work,

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98 For example, many Islamic countries have abolished *Waqf*s by their own will. See Paul Stibbard, David Russell and Blake Bromley, 'Understanding the Waqf in the World of the Trust' (2012) 18 Trusts and Trustees 785, 796–801.

99 Jeffrey A. Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic *Waqf:* A Comparison with the Trust' (1999) 32 Vanderbilt Journal of Transnational Law 1191, 1193.

100 Roland Knyvet Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities* (5th edn, W. Thacker & Co. 1921), 47.

101 John Makdisi, 'Logic and Equity in Islamic Law' (1995) 33 American Journal of Comparative Law 63, 63.

102 Abdel-Razzak Al-Sanhuri (1895–1971) is a formidable Egyptian comparatist and one of the 'most celebrated jurists' in the last century. He drafted many legal codes for various Arab countries based on principles of Islamic law and French Civil law. See Amr Shalakany, 'Sanhuri, and the historical origins of comparative law in the Arab World (or how sometimes losing your *Asalah* can be good for you)' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001), 152.

103 Ibid. 154.

104 Ibid.

> [Sanhuri] is remembered above all as the man who attempted to use a comparative law methodology to modernize Islamic law—and failed at it. The argument goes that Sanhuri's use of comparative law over-exposed the "Islamic" in Islamic law to alien sources, compromised its cultural authenticity or *asalah*, and led Arab lawyers into a wilderness of professional alienation from the historical identity.[105]

Sanhuri brought the forces of comparative law to bear on Islamic law in pursuit of reforming Islamic law to be 'sophisticated enough' to meet contemporary challenges, and 'unadulterated enough . . . to preserve Islamic identity'.[106] In fact, this is the objective of this book in the area of Islamic *Waqf* law. What Sanhuri's analysis lacked was the internal hermeneutic legitimising step elucidated in the previous section. Islamic law may adopt many foreign laws, and, unless comparatists seek internal Islamic legitimacy for these laws by elaborating and using Islamic interpretive methods, many Muslims will remain sceptical of these laws, as they are foreign. The key is to show that although they are foreign, they could also be derived or assimilated by the indigenous interpretive workings of the Islamic legal system.

Conclusion

To conclude, this chapter has described the general background of the book's research problem. Additionally, it explained the research problem and the aims of the book. It also described the two main general discourses that this book is situated in: multiculturalism and *ijtihād*. It then discussed the comparative legal methodology that will be employed in this book. Finally, some expected general problems were briefly remarked upon with a succinct discussion of how these problems will be confronted.

105 Ibid. 153.
106 Ibid. 159.

CHAPTER 2

The Current State of Islamic *Waqf* Law: Highlighting and Discussing the Criticisms of the *Waqf* System

1 Overview of *Waqf* Law

1.1 *Definition of* Waqf

As the term *Waqf* conveys a 'myriad of meanings', it has no direct English legal synonym; words such as trust or endowment do not fully capture what a *Waqf* is.[1] In Islamic jurisprudence, the terms *Waqf* and *Ḥabs* are used interchangeably.[2] In fact, some Arabic dictionaries have simply used the word *Waqf* to define the word *Ḥabs*,[3] and others have used the word *Ḥabs* to define the word *Waqf*.[4] Linguistically, the root *Waqafa* means to stop or stay.[5] The root *Ḥabasa* means to prevent or imprison.[6] Prophet Mohamed explicitly used the term *Ḥabs* to describe how a *Waqf* operates. In a prophetic tradition (*Ḥadīth*), Prophet Mohamed said, '*Iḥbis Alaṣl wa sabbil althamarah*', which literarily means: 'imprison the capital and liquidate its fruit'.[7]

1 Muhammad Zubair Abbasi, 'The Classical Islamic Law of *Waqf*: A Concise Introduction' (2012) 26 Arab Law Quarterly 121, fn 4.

2 Moḥammad Alkubaysī, *Aḥkām Alwaqf fī Alsharī'ah Alislāmīyah*, vol 1 (Maṭba'at Alirshād 1977), 55.

3 Mohammed Ibn Abi Bakr Ar-Rhazi, *Mukhtar us-Ṣiḥaḥ* (Librarairie du Liban 1989), 106; Naṣir Abū Almakārim, *Almughrab fī Tartīb Almu'rab* (Dar alkitāb al'arabī), 101.

4 Aḥmad Alfayumī, *Almiṣbāḥ Almunīr fī Gharīb Alsharḥ Alkabīr* (Dar Alfikr), 669; Almakārim 492; 'umar Alnasafī, *Ṭulbat Alṭulbah* (Maktabat Almuthanā 1311 AH), 105.

5 Alfayumī. For a more comprehensive elaboration of the different meanings of the root *Waqafa*, see Ibn Manthūr, *Lisān Al'arab*, vol 15 (Dar Ṣādir 2003) under the root *Waqafa*.

6 Alfayumī 118. For a more comprehensive elaboration of the different meanings of the root *Ḥabasa*, see Ibn Manthūr, *Lisān Al'arab*, vol 4 (Dar Ṣādir 2003) under the root *Ḥabasa*.

7 Aḥmad Alnasā'īī, *Sunan Alnasā'īī* (Maktab Almaṭbū'āt Alislāmīah 1994), *Ḥadīth* no. 3604; Moḥammad Alqazwīnī, *Sunan Ibn Mājah* (Almaktabah Al'ilmīyah), *Ḥadīth* no. 2397 [translation my own].

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The *Ḥanbalī* school of thought derived its definition of *Waqf* from this seminal *Ḥadīth*.[8] The main *Ḥanbalī* definition of *Waqf* is therefore, 'the imprisonment of capital and liquefaction of benefit'.[9] Other *Ḥanbalī* treatises have defined *Waqf* with a focus on the ownership status of the *Waqf*, regardless of the beneficiaries' status. For example, Albahūtī defines *Waqf* as 'freezing property and preventing it from being owned by any means by first ceasing its initial owner's ownership'.[10] This definition does not clash with the other *Ḥanbalī* definition; the first definition captures more generally why such a drastic ownership stance is adopted. As a result, the second definition falls short as it fails to explain the reason behind this ownership structure. Such an explanation is vital as removing all 'legal ownership' rights from property is not an end in its own right; it is a means to an end, and without explaining the end the means can become unintelligible.[11] The best and clearest *Ḥanbalī* definition is found in another of Albahūtī's commentaries on Alḥajjāwī's treatise *Al'iqnā'*, '*Waqf* is a process whereby an owner with legal capacity imprisons his wealth for a particular benefit ending all [legal] ownership rights in the property's capital'.[12] The *Shāfi'ī* school's main definition closely resembles Alḥajjāwī's definition. According to the *Shāfi'ī*s, *Waqf* is defined as 'the imprisonment of a property's capital that is capable of creating a benefit that is permissible [Islamically]'.[13]

The *Mālikī* school makes the perpetuity of *Waqf*s immediately apparent from its adopted definition. According to *Mālikīs, Waqf* is 'the imprisonment of the capital to those who have the right to derive its benefit in perpetuity'.[14]

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8 Some major *Ḥanbalī* treatises have omitted defining *Waqf*s altogether: see Moḥammad Ibn Mufliḥ Almaqdisī, *Alfurū'*, vol 4 (4th edn, 'alam Alkutub 1985), 581. The *Ḥanbalī* school was named after it eponym Aḥmad Ibn Ḥanbal (780–855 AD/164–241 AH).

9 'Ali Almirdāwī, *Al'inṣāf fī Ma'rifat Alrājiḥ min Alkhilāf*, vol 7 (2nd edn, Dar 'Iḥyā' Alturāth Al'arabī), 3; Ibn Qudāmah Almaqdisī, *Almughnī*, vol 6 (Maktabat AlQāhirah 1968), 3.

10 Manṣūr Albahūtī, *Sharḥ Muntahā Al'irādāt*, vol 2 (1st edn, 'Alam Alkutub 1993), 397 [translation my own].

11 I borrowed the term 'legal ownership' from English trust law just to clarify my point. The term is not used in Islamic law.

12 Manṣūr Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, vol 4 (Dār Alfikr wa 'alam Alkutub 1982), 240 [translation my own].

13 Aḥmad Ibn Ḥajar Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, vol 6 (Dār 'iḥyā' Alturāth Al'arabī), 235; Mohammad Alramlī, *Nihāyat Almuḥtāj Sharḥ Alminhāj*, vol 5 (Dār Alfikr 1984), 358; Moḥammad Alkhaṭīb, *Mughnī Almuḥtaj ilā Ma'rifat Ma'ānī Alfāth Alminhāj*, vol 3 (1st edn, Dār Alkutub Al'ilmīyah 1994), 522; Zakarīyā Alanṣārī, *Asnā Almaṭālib Sharḥ Rawḍat Alṭālib*, vol 2 (Dār Alkitāb Alislamī), 457 [translation my own]. The *Shāfi'ī* school was named after its eponym Moḥammad Alshāfi'ī (767–820 AD/150–204 AH).

14 Moḥammad Alḥaṭāb, *Mawahib Aljalīl Sharḥ Mukhtaṣar Khalīl*, vol 6 (3rd edn, Dār Alfikr 1992), 18 [translation my own]. The *Mālikī* school was named after its eponym Mālik Ibn Anas (711–795 AD/93–179 AH).

Interestingly, the term 'in perpetuity' exceeds requirements according to the *Mālikī* school, since its position allows temporary *Waqf*s. Some *Malikīs* have simply defined a *Waqf* as property that is inalienable.[15] Again, for similar reasons to those explained in the analysis of Albahūtī's first definition, this definition falls short of what a *Waqf* really is.

The *Ḥanafī* school has two main definitions of *Waqf* derived from the two conflicting juristic opinions on the nature of *Waqf*s within the school itself.[16] As Abū Ḥanīfah holds, in one of the opinions attributed to him, that *Waqf* ownership remains with the settlor (*Wāqif*), the first definition in the *Ḥanafī* school echoes that opinion stating that a *Waqf* is 'the imprisonment of capital and its prevention from leaving the *Waqif's* ownership and the liquidation of the benefit for charitable purposes'.[17] In English trust terms, the *Wāqif* retains legal ownership while forgoing his beneficial entitlement. The second definition in the *Ḥanafī* school is derived from Abū Yūsuf and Moḥammad ibn Alḥassan's opinion, who believe that in a *Waqf*, the *Wāqif* dispenses with all his ownership entitlements and the *Waqf* is therefore owned by God. So, according to the second opinion, a *Waqf* is 'the imprisonment of capital to the implied ownership of God'.[18] Under Islamic law, the *Waqf* administrator (*Mutawallī*) and the judge (*Qāḍī*) share the powers of a trustee, who legally owns the trust property under common law. *Mutawallīs* undertake the day-to-day management of *Waqf*s whereas *Qāḍī*s hold the power to sell the *Waqf* property and make orders for the purchase of another to replace it.

This examination of the various definitions within the various schools of thought is not a mere exercise in semantics: different definitions reflect different normative standpoints as explained in the discussion of the *Ḥanafī* definitions. After surveying the various definitions of *Waqf* adopted by prominent Islamic jurists, Alkubaysī concluded that the *Ḥanbalī* definition is the most accurate as it is taken from the definition of 'Umar Ibn Alkhaṭāb, the second Muslim Caliph.[19] 'Umar's definition is seen as authoritative because of his

15 Aḥmad Alqarāfī, *Althakhīrah*, vol 5 (1st edn, Dār Alkutub Al'ilmīyah 2001), 422.

16 'Abduljalīl 'Ashūb, *Kitāb Alwaqf* ('Abdullah Mazzī ed, 1st edn, Almaktabah Almakiyah 2009), 27. The *Ḥanafī* school was named after its eponym Abū Ḥanīfah (699–767 AD/ 80–150 AH).

17 Ibn Nujaym, *Albaḥr Alrā'iq Sharḥ Kanz Aldaqā'iq*, vol 5 (2nd edn, Dār Alkitāb Alislāmī), 202; Ibn 'Ābdīn, *Rad Almuḥtār 'alā Aldur Almukhtār*, vol 4 (2nd edn, Dār Alfikr 1992), 337; 'Ashūb 27; Moḥammad Alsarkhasī, *Almabsūṭ*, vol 12 (Dār Alma'rifah 1993), 27–30 [translation my own].

18 Ibn Nujaym; 'Ashūb 27 [translation my own].

19 Alkubaysī 88. 'Umar Ibn Alkhaṭāb was born between 586–90 AD and he died on 644 AD; his reign lasted from 634 AD until his death.

antiquity, as his life coincided with that of the Prophet. Further, this definition is also taken from the *Ḥadīth* mentioned above.

Contemporary Islamic jurists have provided more modern definitions of *Waqf*: for example, Kahf states that a *Waqf* is 'separating productive wealth or immovable property away from one's personal patrimony and designating its benefit for charitable, social, religious or public purposes'.[20] Section 2(1) of the Mussulman Wakf Validating Act, which was promulgated by the British in British India to re-allow perpetual family, defines a *Waqf* as 'the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious, or charitable'.[21] In legal terms, a *Waqf* is 'a gift of property that is protected from sale and seizure' where 'its use or benefit' is 'given to others'.[22] From an economic perspective, Budiman and Kusuma describe it as, 'diverting funds (and other resources) from consumption and investing them in productive assets that provide either usufruct or revenues for future consumption by individual or groups of individuals'.[23]

A *Waqif* can create three types of *Waqf*: *Khayrī, Thurrī*, and *Mushtarak*.[24] A *Waqf Khayrī* is a charitable *Waqf* whereby a *Wāqif* settles his property in perpetuity for a specific charitable purpose. A *Waqf Thurrī or Ahlī*, otherwise known as a family *Waqf*, is one where the *Waqf* property is perpetually 'reserved for a charitable purpose', with the settlor's family, descendants, or both being the sole or joint intermediary beneficiaries until they become extinct, after which the *Waqf*'s benefit will be solely dedicated to a specifically designated charitable purpose.[25] A *Waqf Mushtarak* is a *Waqf* that is immediately and simultaneously charitable and private.[26] Although a *Waqf Thurrī* is ultimately charitable and can therefore also be described as a combined *Waqf*, the *Waqf Mushtarak*'s

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20 Monzer Kahf, *Alwaqf Alislāmī: Taṭūruhu, 'Idāratuhu, Tanmiyatuhu* (2nd edn, Dār Alfikr Almu'aṣir 2006), 17.

21 The Mussulman Wakf Validating Act, No. VI of 1913.

22 'The Islamic Law of Waqf' *Lexis Nexis Butterworths News* (16/05/2001) 46.

23 Mochammad Arif Budiman and Dimas Bagus Wiranata Kusuma, 'The Economic Significance of Waqf: A Macro Perspective' (The 8th International Conference on Tawhidi Methodology Applied to Islamic Micoenterprise Development, Jakarta, January 7–8, 2011 Available at SRRN: http://ssrncom/abstract=1844606), 5.

24 Kahf 158; Magda Ismail Abdel Mohsin, 'Revitalization of waqf administration & family waqf law' (2010) 7 US-China Law Review 57, 58.

25 Hisham Marwah and Anja K. Bolz, 'Waqfs and trusts: a comparative study' (2009) 15 Trusts and Trustees 811, 812.

26 Caution must be taken with this term as some Islamic jurists have used it to mean a family *Waqf* that has multiple classes of beneficiaries. See Ibn Qudāmah Almaqdisī,

immediate combined nature makes it worthy of that title. According to the most circulated opinion in Islamic law, in all three types of *Waqf* the property is deemed to be owned by God.[27]

1.2 *Foundations of* Waqf *Law*

Although the laws of *Waqf* are not mentioned in the Quran, one *Ḥadīth* has it that a particular verse in the Quran inspired the creation of one of the earliest *Waqfs*. The Quran states, as translated in English, 'By no means shall you attain to righteousness until you spend (benevolently) out of what you love; and whatever thing you spend, Allah surely knows it'.[28] The *Ḥadīth* reports that Abū Ṭalḥah, one of the companions of prophet Mohamed, possessed the most number of palm trees in Madinah and his favourite field was Bayruḥā' in front of the mosque. When this Quranic verse was revealed, Abū Ṭalḥah said to prophet Mohamed, 'O Messenger of God, Allah says, "By no means shall you attain to righteousness until you spend out of what you love" and my most beloved property is Bayruḥā', I therefore declare it a charity for the sake of Allah and I hope for its reward from Him, so place it O Messenger of God where Allah inspires you to do so'. Prophet Mohamed then said, 'this is a profitable investment! My opinion is that you direct its benefit to your family'. Abū Ṭalḥah did so.[29] Although the *Ḥadīth* does not state that Abū Ṭalḥah created a *Waqf*, Islamic jurists have understood that a *Waqf* was indeed created and they used Abū Ṭalḥah's settlement as evidence for the legitimacy of *Waqfs*.[30]

The most important *Ḥadīth* establishing the legitimacy of *Waqfs*, however, is that of 'Umar's land in Khaybar.[31] 'Umar was granted a land in Khaybar, an oasis town 180 kilometers north of Madinah, and he went to prophet Mohamed and said, 'I was granted a piece of land that is more precious than all my other properties, what do you command me to do with it?' Prophet Mohamed replied, 'If you wish, you can imprison its capital and designate its benefit to charity'. 'Umar did so with the conditions that the capital is not sold, gifted,

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Almughnī, vol 10 (Maktabat AlQāhirah 1968), 198; Almaqdisī, *Alfurū'*, 609; Aḥmad Ibn Ḥajar Alhaytamī, *Alfatāwā Alfiqhīyah Alkubrā*, vol 3 (Dār Alfikr 1983), 252.

27 This opinion can be gleaned from the survey of the definition of *Waqf* across all the four schools of thought, as discussed above.

28 *The Quran—Arabic Text & English Translation* (M.H. Shakir tr, Burhan Publications 2011), 3: 92.

29 Aḥmad Ibn Ḥajar Al'asqalānī, *Fatḥ Albārī Sharḥ Ṣaḥīḥ Albukhārī* (Dār Alrīyān Lilturāth 1986), ḥadīth no. 5288 [translation my own].

30 Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 235; Alkhaṭīb 521.

31 Moshe Gil, 'The Earliest *Waqf* Foundations' (1998) 57 Journal of Neart Eastern Studies 125, 126.

inherited and that its fruit is spent on the poor, the relatives, freeing slaves, preparing soldiers for battle, guests, and the travellers who did not have means to return home. ʿUmar also permitted those in charge of administering the *Waqf* to receive some income from it in return for their services.[32]

In another *Ḥadīth*, prophet Mohamed says, '[w]hen a person dies, (the reward of) his deeds stops except for three exceptions: A perpetual charity (*Ṣadaqah Jārīah*), knowledge from which benefit is (continuously) gained, or a pious child who is invoking Allah for him'.[33] On his commentary on this *Ḥadīth*, Alnawawī states that a perpetual charity is a *Waqf*.[34] Moreover, ʿAshūb states that a perpetual charity can only be created by a *Waqf*, no other conceivable means could be used to create it.[35] In fact, this opportunity for perpetuity largely influenced Muslims' decisions to create *Waqfs*, and on their subsequent proliferation. Boudjellal asserts, '[b]ecause of the continuous rewards (*ajr*) of waqf donations, Muslims, throughout Islamic history, have found in this particular form of charity the best way to express their attachment to Islamic values'.[36]

Some Islamic jurists invoked consensus (*ʾIjmāʿ*) as evidence for the validity of *Waqfs*.[37] In his treatise on *Waqfs*, ʿAshūb states, 'the Islamic nation continued to create *Waqfs* from the time of the Messenger of Allah, his companions, their companions, and those who came after them, generation after generation . . . this is a consensus in their actions (*ʾIjmāʿ ʿAmalī*)'.[38] This is supported by the saying of Jābir, a companion of prophet Mohamed, who stated, 'every companion of the prophet who had financial capability created a *Waqf*'.[39]

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32 Alʿasqalānī, *Ḥadīth* no. 2620; Yiḥyā Alnawawī, *Sharḥ Alnawawī ʿalā Muslim* (Dār Alkhīr 1996), *Ḥadīth* no. 1633 [translation my own].

33 Alnawawī, *Sharḥ Alnawawī ʿalā Muslim, Ḥadīth* no. 1631. Translation of the *Ḥadīth* largely influenced by Aḥmad Ibn Ḥajar Alʿasqalānī, *Bulugh Al-Maram Min Adillat Al-Ahkam* (Selma Cook ed, Dr. Nancy Eweiss tr, Dar Al-Manarah 2003), 342.

34 Alnawawī, *Sharḥ Alnawawī ʿalā Muslim, Ḥadīth* no. 1631.

35 ʿAshūb 32.

36 Mohammed Boudjellal, 'The Need for a New Approach to the Role in Socioeconomic Development of *Waqf* in the 21st Century' (2008) 12 Review of Islamic Economics 125, 125.

37 *ʿIjmāʿ* is the third primary source of Islamic law, after the *Quran* and *Sunnah*. See Moḥammad Alghazālī, *Almustaṣfā* (Moḥammad Alshafi ed, 1st edn, Dār Alkutub Al'ilmiyah 1993), 137; Moḥammad Alrāzī, *Almaḥsūl*, vol 4 (Taha Al'alawāni ed, 3rd edn, Alrisālah 1997), 17–213; Moḥammad Alfutūḥī, *Mukhtaṣar Altaḥrīr fī Usūl Alfiqh* (Moḥammad Ramaḍan ed, 1st edn, Dār Alarqam 2000), 106–111.

38 ʿAshūb 32 [translation my own].

39 Almaqdisī, *Almughnī* 3; ʿAbdullah Almūṣilī, *Alikhtīar Litaʿlīl Almukhtār*, vol 3 (Dār Alkutub Alʿilmīah), 40 [translation my own]; Kahf 86.

However, despite the declaration of consensus, some early Islamic jurists, such as the famous judge Shurayḥ, did not permit *Waqfs*.[40] Additionally, according to an account in the *Ḥanafī* school of thought, Abū Ḥanīfah himself did not permit *Waqfs*, save for some instances such as *Waqfs* for mosques.[41] Although when Abū Yūsuf, Abū Ḥanīfah's most famous disciple, was made aware that 'Umar, the second Islamic Caliph, had constituted a *Waqf* he said, 'this is an indubitable matter, if Abū Ḥanīfah was aware of this *Ḥadīth*, he would have followed it'.[42] A second opinion linked to Abū Ḥanīfah is that a *Waqf* is a *Jā'iz* contract (revocable); the settlor or beneficiaries can revoke it.[43] In any event, the rationale for prohibiting *Waqfs* was that they evaded Islamic forced heirship laws. However, this opinion prohibiting *Waqfs* was soon abandoned (*Mahjūr*),[44] especially as the *Ḥadīths* surrounding *Waqfs* became well reported and authenticated, and the social benefit of *Waqfs* became more apparent.[45] Mālik, the founder of the *Mālikī* school of thought, is said to have played a pivotal role in changing the position of the students of Abū Ḥanīfah (and subsequently, this ironically changed the major applicable opinion of the *Ḥanafī* school of thought), after his famous debate with Abū Yūsuf where he proved the legitimacy of *Waqfs* and convinced Abū Yūsuf to stray from the opinion of his teacher.[46] Mālik's argument can be summed up in one of his sayings,

> Shurayh spoke in his land, he did not come to Madinah and see the *Waqfs* of the prophet's wives, companions and their companions up until this day. Here the *Waqfs* are still visible, nobody has challenged them. Further, these are the charities [Waqfs] of the prophet, seven farms, still before us.[47]

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40 Almaqdisī, *Almughnī* 3; Muṣṭafā Alzargā, *Aḥkām Alwaqf*, vol 1 (2nd edn, Dār Ammār 1998), 22; Badr Al'aīnī, *Albināīah Sharḥ Alhidāyah*, vol 7 (1st edn, Dār Alkutub Al'ilmīah 2000), 424; Ibn Alhumām, *Fatḥ Alqadīr*, vol 6 (Dār Alfikr), 199.

41 Alzargā, *Aḥkām Alwaqf*, 23; Almūṣilī 40; Al'aīnī 424; Ibn Alhumām 199.

42 Alzargā, *Aḥkām Alwaqf*, 23 [translation my own].

43 Ibid.; 'Ashūb 29.

44 The late *Ḥanafī*s do not adopt Abū Ḥanīfah's opinion prohibiting *Waqf*s. See Moḥammad Ibn Rushd Alqurṭubī, *Almuqadimāt Almumahidāt*, vol 2 (1st edn, Dār Algharb Alislāmī 1408 AH), 417.

45 Aḥmad Ibn Taymīyah, *Alfatāwā Alkubrā*, vol 4 (1st edn, Dār Alkutub Al'ilmīah 1987), 249.

46 Alqurṭubī 417.

47 Ibid. [translation my own].

From a western perspective, Hennigan criticises the authenticity of the legal sources of *Waqf*, such as the *Ḥadīth* of 'Umar's land in Khaybar.[48] He believes that the Islamic legal traditions upon which the law of *Waqf*s was developed are not 'historically reliable' as he is sceptical of the authenticating methodology employed by early Islamic scholars.[49] However, Hennigan's method was criticised by other writers as inappropriate when treating classical Islamic sources. Saleh states,

> I am not fully convinced that the elements of his [Hennigan's] reasoning are necessarily apposite. I do not believe that the fruit of labour realized by early Muslims could be fairly assessed by the methodical Western reasoning in the 21st century. The process would call for many assumptions and lead only to a speculative conclusion.[50]

Further, Hennigan himself acknowledges that because Western scholars operate outside the Islamic legal tradition, their work does not affect the internal Islamic discipline; it just creates another reality.[51] Nonetheless, Gil states, 'the facts we do have could not have been invented, and there is a fair amount of unanimity in the way they are presented'.[52] What matters now is precisely this: contemporary Islamic jurists and the majority of classical Islamic jurists are unanimous as to the permissibility of the *Waqf* structure. Further, the internal challenge brought from a couple of prominent Islamic jurists does not hold much weight today as they were thought to be propagated without taking into account the relevant *Ḥadīths* establishing the legitimacy of *Waqf*s. Hennigan's modern critique is interesting but too 'speculative' to rely on in illegitimating a structure that has stood almost unchallenged for 14 centuries.

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48 Peter C. Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century AH Ḥanafi Discourse* (Brill 2004), 107–186.

49 Ibid. 110.

50 Nabil Saleh, 'The Birth of a Legal Institution (The Formation of the Waqf in Third-Century AH Hanafi Legal Discourse) by Peter C. Hennigan' (2004) 19 Arab Law Quarterly 293, 293.

51 Hennigan 186.

52 Gil 125.

1.3 *Fundamentals of* Waqf *Law*

1.3.1 A Brief Note on the Four Schools of Thought and the Reason for Focusing on the Ḥanbalī School

Although many schools of thought emerged in *Sunnī* Islamic law, four schools of thought are dominant;[53] the *Ḥanafī, Mālikī, Shāfiʿī* and *Ḥanbalī* schools, founded in that chronological order. The followers of the *Ḥanafī* School are mainly found in India, Pakistan, Afghanistan, and Turkey, among other places.[54] The current *Mālikī*s are mainly found in North and West Africa.[55] The *Shāfiʿī* School's followers are mainly found in Southeast Asia, East Africa and some Arab countries such as Yemen.[56] *Ḥanbalī*s are mainly located in Saudi Arabia.[57] Nevertheless, generally, small segments of followers of each school can be found in almost any Islamic country.

The scope of this chapter does not allow for a detailed analysis of the laws of *Waqf* according to the four schools of thought. It does not even allow for a detailed analysis of *all* provisions of *Waqf* law according to *one* school of law. Hence, an explanation of the fundamental *Waqf* laws will have to suffice, and that explanation will be according to the *Ḥanbalī* School of thought. The reason behind the choice of the *Ḥanbalī* School of thought is because despite its significance (it governs Saudi Arabia, a largely influential Islamic country),[58] little has been written about its *Waqf* laws in English.

English literature and commentary on *Ḥanbalī* jurisprudence is scarce. The other three schools, however, are relatively more known in Western cycles as they had been adopted and followed by colonised countries; the few areas that adopted *Ḥanbalī*sm were never colonised by Western countries. Being the

53 Sarah Spells, 'Researching Islamic Law: An Introduction' (2009) 9 Legal Information Management 191, 191.

54 Muhammad Abu Sadah, 'Philosophical Basis of the Legal Theory Underlying International Commercial Arbitration in the Middle East Region' (2009) 8 Journal of International Trade Law & Policy 137, 144.

55 Ibid.

56 Ibid.

57 Ibid.

58 Christopher Melchert, *Ahmad ibn Hanbal* (Oneworld 2006), vii. English courts have recognised that Saudi Arabia adopts the *Ḥanbalī* school, see, *Abdel Hadi Abdallah Al Qahtani & Sons Beverage Industry Co v Antliff* [2010] EWHC 1735 (Comm), [31]. The *Ḥanbalī* school is also adopted by Qatar and parts of the UAE, see, Talal Al-Emadi, 'Qatar Arbitration Law: Some Central Issues' (2009) 11 International Arbitration Law Review 69, 70.

adopted school of the majority of Muslims,[59] the Ottoman Empire and important British colonies such as India, the *Ḥanafī* School is the most commentated upon school by Western writers.[60] Most of what is written by modern Western commentators and academics today on *Waqf*s is based on the *Ḥanafī* School's opinions. In fact, this has been to the extent that opinions in the *Ḥanafī* School have been taken to be rigid embodiments of Islamic law. This is why it is important to attract attention to other schools of equal importance and doctrinal footing.

Further, of all the four schools of thought, the *Ḥanbalī* School appears to be the most systematic and logically expounded in the area of *Waqf*s, which has made it all the more sound to choose the *Ḥanbalī* school.

The eponym of the *Ḥanbalī* School of thought is Aḥmad Ibn Ḥanbal, an Arabic scholar mainly known and revered for his scholarship of *Ḥadīth*.[61] Born in 164 AH/780 AD in Iraq and losing his father at the age of three, his mother bore the responsibility of bringing him up.[62] From a very young age, Aḥmad displayed a strong eagerness for learning, so much so, that his mother 'would withhold his clothes until the dawn call to prayer was heard, to prevent him leaving for the mosque any earlier'.[63] He travelled extensively in the pursuit of collecting *Ḥadīths* and seeking knowledge. Over twenty-five years, his travels took him to Kufa, Wasit, Basra, Mecca, Yemen, Tarsus, Homs, and Damascus learning from over 400 teachers.[64] He was a man of great piety, reticence, and humility and this influenced how he dispensed his legal opinions. Melchert notes, 'he would not wish to renounce the prerogative of answering questions cautiously, to say "I don't know" or "I hope there is no harm in it," rather than having to make decisions with immediate and often irrevocable consequences'.[65] Aḥmad was a man of 'unremitting seriousness and inattention to the world around him' and he had 'no ambitions for personal honor and fame'.[66] He died

59 Lu'ayy Minwer Al-Rimawi, 'Relevance of Sharia as a legislative source in a modern Arab legal context: a brief constitutional synopsis with emphasis on selected commercial aspects' (2011) 32 Company Lawyer 57, 58.

60 For example, Hamilton's translation of Hidaya, a *Ḥanafī* manual, was completed around 1780. See, Burhanuddin Marghinani, *The Hidaya: The Classic Manual of Hanafi Law* (Z. Baitner ed, Charles Hamilton tr, Darul Ishaat 2005).

61 Melchert 1

62 Ibid. 2.

63 Ibid. 2–3.

64 Ibid. 4, 38 & 48.

65 Ibid. 4.

66 Ibid. 6–7.

in 241 AH/ 855 AD, having left behind 'less than a dirham in cash'.[67] He was the last of the four eponyms of the four schools of thought to die.

While Aḥmad is the figurehead and eponym of *Ḥanbalīsm*, '[h]e had no intention of founding a school based on his opinions'.[68] Besides, he was not even primarily known as a jurist, as '[t]enth-century writers classed Ahmad primarily as a collector and critic of hadith'.[69] Nevertheless, Aḥmad viewed law as an important manifestation of righteousness and 'faithfulness'.[70] What began as a group of admirers around Aḥmad gradually grew into a 'mass movement' that formed the *Ḥanbalī* School of thought.[71] His immediate followers started by recording Aḥmad's opinions, and subsequent followers 'systematically' arranged these opinions 'to construct an academic discipline'.[72] The first manual of *Ḥanbalī* law was eventually produced by Al-khiraqī (died 334 AH/ 945–6 AD), and is known as *Mukhtaṣar Al-khiraqī* (The Epitome of Al-Khiraqī).[73]

Very briefly, the *Ḥanbalī* methodology was deeply rooted in traditionalism. As its eponym was a strong advocate and prolific scholar of *Ḥadīth*, the *Ḥanbalī* School strongly relies on *Ḥadīth*.[74] The main sources of Islamic law according to the *Ḥanbalī* School of thought are ranked in the following order. First come sacred texts (*Alnaṣ*), these include Quranic texts and authentically reported *Ḥadīths*.[75] The second source of law is the legal opinions of prophet Mohamed's companions (*Ma Aftā bihi Alṣaḥābah*).[76] If the opinions of the companions differ, then a jurist is free to follow what he deems to be correct.[77] The third source of law is weakly reported *Ḥadīth*s that are not contradicted by more authentic ones.[78] The fourth source of law is legal analogy (*Qiyās*).[79] To illustrate this hierarchical structure with a brief example, if, in the *Ḥanbalī* School of thought, *Qiyās* conflicts with an opinion of the companions of prophet Mohamed, then the latter would prevail. These four sources are not the only

67 Ibid. xi & 16.
68 Ibid. 19.
69 Ibid.
70 Ibid. 22.
71 Nimrod Hurvitz, *The Formation of Hanbalism: Piety into Power* (Routledge 2011), 11.
72 Melchert 59.
73 Ibid. 69.
74 Ibid. 59.
75 'Abdul Qādir Ibn Badrān, *Almadkhal 'Ilā Mathab Alimām Aḥmad Ibn Ḥanbal* (1st edn, Alrisālah 2011), 113–114.
76 Ibid. 115.
77 Ibid. 116.
78 Ibid. 116–118.
79 Ibid. 119–122.

sources of law in the *Ḥanbalī* School, but they are the main and agreed upon sources. Other important sources include the consensus of jurists (*ʾIjmāʿ*),[80] blocking the means to that which is prohibited (*Sad Altharāiʿ*),[81] *Ijtihād*,[82] public interest considerations (*Almaṣlaḥah Almursalah*),[83] and others.

Finally, as a result of the heavy reliance on *Naṣ* and the lack of institutionalism when compared to the other three schools of thought, the *Ḥanbalī* School of thought is not as rigid when following the strict opinions of Aḥmad. Ibn Badrān, a Syrian *Ḥanbalī* jurist who lived in the last century, notes, 'following the *Ḥanbalī* School of thought does not mean copying Aḥmad in every opinion; it means reaching a level where you can follow his methodology of deducing and interpreting legal rules'.[84] The lack of institutionalism compared to the other schools of thought meant that the *Ḥanbalī* School was ultimately the least spread in the *Sunnī* Islamic world. For *Ḥanbalī*s, as a result of the strong ascetic influence from Aḥmad's own reticent lifestyle, it 'was pious not to have anything to do with the government'.[85] Abū Al-wafā Ibn ʿAqīl, a Baghdadi *Ḥanbalī* jurist, explains the implication of this asceticism,

> . . . this school of thought was unjustly served by its followers. When a *Ḥanafī* or *Shāfiʿī* would rise with knowledge he would immediately become a judge and spread the doctrine of his school of thought while *Ḥanbalī*s were more reticent and occupied with piety.[86]

The lack of institutionalism and the less rigid dogmatic following of the school's eponym are two features that markedly distinguish the *Ḥanbalī* School of thought from the other three. It is also a feature that makes it a more flexible school as it is the least fixed and embodied in a particular person or institution. This does not mean that the *Ḥanbalī* School is not strict in its substantive laws, for it has been accused of being the strictest of the four schools. The point is that it is less rigid in its institutionalism and dogmatic following of individual opinions of earlier jurists of the school.

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80 Ibid. 278–285.
81 Ibid. 296–299.
82 Ibid. 367–394.
83 Ibid. 295.
84 Ibid. 110–111 [translation my own].
85 Melchert 3.
86 Ibn Badrān 110 [translation my own].

1.3.2 Fundamentals of Ḥanbalī *Waqf* Law

While, as illustrated above, the foundation of *Waqf* law is found in the *Sunnah* and arguably the Quran, the intricacies of *Waqf* law are a product of *Ijtihād*.[87] Alzargā goes even further and suggests that as the rulings of *Waqf* are a product of *Ijtihād*, they are subject to change in accordance to changes in custom.[88] Western commentators also concur with the fact that *Waqf* law is primarily the product of *Ijtihād*. Hennigan notes, 'while the substantive law of *waqf* developed through rationalist discourse, the institution's cultural (hermeneutical) legitimacy rested upon the traditions of the Prophet and his Companions'.[89] The jurists maintained the *Waqf's* institutional link with the *Sunnah* so that it could remain a 'religious' or 'pious' institution, then they fashioned the laws of *Waqf* in accordance with the societies and customs in which they lived. As a result, many of these laws are just as applicable today as they have ever been. Moreover, jurists may continue to reform these laws, since the process by which they came into force was designed to ensure that law continues to correlate with customary and societal factors.

In any *Waqf* structure, there is a settlor (*Wāqif*), beneficiaries or objects (*Mawqūf ʿalayhim*, sl. *Mawqūf ʿalyh*), property or object of the *Waqf* (*Mawqūf*), and the deed to create the *Waqf* (*Ṣīghah*).[90] The *Mawqūf ʿalyh* can also be a purpose such as preserving mosques. The person who administers and manages the *Waqf* is called a *Mutawallī*, or sometimes *Nāthir*.[91] It would be misleading to translate the *Mutawallī* as 'trustee', as, unlike a trustee, a *Mutawallī* does not hold legal ownership or the powers that stem from it. The judge (*Qāḍī*) oversees the management of the *Waqf*, and he is also a point of resort when it is necessary to sell or exchange *Waqf* property, as a *Mutawallī* cannot do so of his own accord. Even together, the *Mutawallī* and *Qāḍī* do not have the same management powers as a trustee does under English law.

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87 Alzargā, *Aḥkām Alwaqf*, 19; Kahf 115; Naṣir Almīmān, *Alnawāzil Alwaqfiyah* (Dār Ibn Aljawzi 1430 AH), 147; Boudjellal 134. *Ijtihād* was defined and explained in chapter 1. Kamali's definition is amongst the clearest, '[*Ijtihād* is] a creative but disciplined and comprehensive intellectual effort to derive judicial rulings on given issues from the sources of the *Sharīʿah* in the context of the prevailing circumstance of the Muslim society'. See Kamali, 'Issues in the Understanding of Jihād and Ijtihād' (2002) 41 Islamic Studies 617, 623.

88 Alzargā, *Aḥkām Alwaqf*, 59–60.

89 Hennigan 107.

90 The term deed here is used in a much wider sense than English law. A deed here can be oral or written. According to some *Ḥanbalī* jurists, as discussed below, in absence of a written or oral deed, some actions can constitute a *Waqf*.

91 Sometimes spelt *Nazir*.

According to one account in the *Ḥanbalī* school of thought, a *Waqf* can only be created orally.[92] However, another account—which is followed by the majority of *Ḥanbalī* jurists—holds that a *Waqf* can be created orally or by conduct providing there is sufficient evidence that the act was brought about by an intention to create a *Waqf*.[93] To clarify what constitutes such an act, the *Ḥanbalīs* give the example of a person who designates his land a graveyard and then generally allows people to bury their dead in it.[94] The designation of land as a graveyard is the act and the owner's permission for people to bury their dead in it is sufficient evidence that he intended to create a *Waqf*.[95] As for the oral creation of a *Waqf*, this can be by express (*Ṣarīḥ*) or implied (*Kināyah*) terms.[96] Express terms are terms such as, 'I declare *Waqf*' or 'I declare *Ḥabs*'.[97] Implied terms include terms like, 'I designate this land for charity' or 'I imprison this land for charity'.[98] To create a *Waqf*, an implied term must be complemented by the appropriate intention.[99]

According to the *Ḥanbalī*s, a *Waqf* must satisfy five conditions to be valid.[100] First, the object of the *Waqf* must be a quantifiable property that is capable of being sold.[101] The quantifiable property must also be capable of generating continuous benefit and, in theory at least, it must be capable of existing

92 Almirdāwī 4. The *Ḥanafī* and *Shāfiʿī* schools also follow this opinion, see, Ibn Alhumām 202–203; Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 236 & 248; Alramlī 359 & 370.

93 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 241; Almirdāwī 3. The *Ḥanafī* and *Mālikī* schools of thought also follow this opinion, see, Alsarkhasī 33; Alqarāfī 436; Alḥaṭāb 27.

94 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 241. The *Shāfiʿī* school of thought specifically denies that such an example would create a Waqf, see, Alramlī 370.

95 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 241.

96 Ibid. 241; Almirdāwī 5. The *Shāfiʿī* school of thought only accepts express terms for the creation of a *Waqf*, see, Alramlī 371.

97 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 241; Almirdāwī 5.

98 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 242; Almirdāwī 5.

99 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 242; Almirdāwī 5.

100 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 243. Some *Ḥanbalīs* only require the satisfaction of four conditions for a *Waqf* to be valid, see, Almirdāwī 7.

101 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 243; Almirdāwī 7. The *Shāfiʿī* school also follows this opinion, see, Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 237; Alramlī 360. *Ḥanafīs* generally prohibit creating *Waqf*s of movable property unless such property is ancillary to immovable property such as fixtures and fittings to a house. Abū Ḥanīfah prohibits *Waqf*s of books, weapons and shields. Moḥammad, however, permits *Waqf*s of weapons and shields. See, Abū Bakr Alkāsānī, *Badāʾiʿ Alṣanāʾiʿ fī Tartīb Alsharāʾiʿ*, vol 6 (2nd edn, Dār Alkutub Alʿilmiyah 1986), 220; Ibn Alhumām 216.

in perpetuity.[102] It can be sold or exchanged if necessity arises and the sale or exchange must be sanctioned by a *Qāḍī*, a process known in Islamic law as *'Istibdāl*.

While some *Ḥanbalī* jurists have not allowed for exceptions from this condition,[103] the majority of *Ḥanbalī* jurists have made some exceptions to this condition and allowed the *Waqf* of extinguishable objects with a short life, or in other words, destructible property, such as copies of the Quran, books, furniture, women's jewelry,[104] and weapons amongst other similar things.[105] The basis of this exception is a *Ḥadīth* in which prophet Mohamed said, 'as for Khālid, you do injustice to him, for he has endowed his shields and weapons for the sake of Allah'.[106] Prophet Mohamed made mention here of a *Waqf* for shields and weapons (extinguishable objects) without disapproving it. In Islamic law, when the Prophet does not disapprove of something in his presence or if it comes to his attention, then it is deemed permissible and incorporated into the corpus of Islamic law; this is known as *Iqrār*.[107] *Ḥanbalīs* also permit the *Waqf* of particular shares of larger property that satisfies the conditions above, this is known as *Waqf Almushā'*.[108] Some commentators claim that this was what was done by 'Umar in his land in Khaybar, as he only owned

102 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 243; Almirdāwī 7. The *Shāfi'ī* school also follows this opinion, see, Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 237; Alramlī 361.

103 Almirdāwī 7.

104 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 244.

105 Ibid. 243. The *Shāfi'ī* school of thought seems much more expansive in the exceptions it allows to this condition, even allowing creating *Waqf*s for fragrances so that they may be smelt. See, Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 238; Alramlī 362. The *Mālikī* school is even more expansive with some allowing *Waqf*s of food and money (cash Waqfs), see, Alqarāfī 433 & 435; Alḥaṭāb 21–22. Although, *Mālikīs* explain that food *Waqfs* are simply making food available for a deferred price, not that food would be subject of a *Waqf* in the conventional way.

106 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 243; Alnawawī, *Sharḥ Alnawawī 'alā Muslim, ḥadīth* no. 983.

107 Alfutūḥī 100; Ibn Qudāmah Almaqdisī, *Rawḍat Alnāthir wa Junatu Almunāthir*, vol 1 (Sa'ad Alshathri ed, 1st edn, Dār Alḥabīb 1422 AH), 286.

108 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 243; Almirdāwī 8. The *Shāfi'ī* school of thought also follows this opinion, see, Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 238; Alramlī 362. Some *Mālikīs* do not allow *Waqf Almushā'* without the permission of the other shareholders, see, Alḥaṭāb 18. While others permit it, see, Alqarāfī 435. In the *Ḥanafī* school, Abū Yūsuf permits *Waqf Almushā'* while Moḥammad forbids it, see, Alkāsānī 220; Ibn Alhumām 210–211.

one hundred shares in a larger plot of land.[109] Finally, in discussing this particular condition, classical *Ḥanbalī* jurists make it clear that other properties with extinguishable benefit such as money cannot be the object of *Waqf*s.[110]

The second condition for the validity of a *Waqf*, according to the *Ḥanbalī*s, is that it is settled for a pious purpose (*ʿAlā birr*).[111] A pious purpose has been defined as anything that is good and pleases God.[112] While charity, as understood in English law, is also a pious purpose under Islamic law, it does not exhaust all charitable purposes in Islamic law. Unlike English law,[113] in Islamic law, providing for one's family is an act of charity in its own right, be it in a *Waqf* or otherwise.[114] In a prophetic tradition, prophet Mohammad said, 'Giving money to the poor is charity, and giving money to your relatives counts as two acts of charity'.[115] This was even acknowledged in a colonial Privy Council case:

> The theory of the deed seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a meritorious purpose. *It is superfluous at the present day to say that this is not the law*.[116]

The *Ḥanbalī*s are stricter than the other three schools in adhering to this second condition in the sense that they do not allow *Waqf*s for permissible (*Mubāḥ*) purposes, and, *a priori*, for repugnant (*Makrūh*) and prohibited (*Ḥarām*) purposes.[117] So, for example, although education is charitable in Islamic law, *Ḥanbalī*s do not allow *Waqf*s for the purpose of teaching poetry,

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109 Alnasāʾīī, *Ḥadīth* no. 3604; Alqazwīnī, *Ḥadīth* no. 2397. Some Islamic scholars have doubted the authenticity of this report and have questioned whether 'umar's *Waqf* was *Mushāʿ*. See Aḥmad Ibn Ḥajar Alʿasqalānī, *Altalkhīṣ Alḥabīr*, vol 3 (1st edn, Muʾasasat Qurṭubah 1995), 148.

110 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 244; Almirdāwī 10.

111 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 245; Almirdāwī 12

112 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 245.

113 The common law's concept of charity excludes the provision for relatives. See *Re Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

114 Alzargā, *Aḥkām Alwaqf*, 176.

115 Moḥammad Nāṣir Aldīn Alalbānī, *Ṣaḥīḥ Altarghīb wa Altarhīb* (5th edn, Maktabat Almaʿārif), *ḥadīth* no. 892 [translation my own].

116 *Mujibunnissa v Abdul Rahim* (1900) 28 Ind Apps 15.

117 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 246. All schools would not allow *Waqf*s for *Ḥarām* or *Makrūh* purposes. The issue here is with *Muhāḥ* purposes.

though teaching poetry is *Mubāḥ*, as teaching poetry is not a pious purpose.[118] *Ḥanbalīs* say that this is because creating a *Waqf* is a pious act (*Birr*) and should therefore only be established to provide for other pious acts. Ibn Taymīyah defends this opinion, 'if a *Wāqif* stipulates a purpose that has no reward in the afterlife [because it is not an act of *Birr*] then pursuing this purpose is pursuing something that is of no benefit to the *Wāqif* in his earthly life or afterlife, and this is not permissible'.[119] Nevertheless, some contemporary *Ḥanbalī* jurists have deviated from this opinion. One of those is Naṣir Almīmān who holds that *Mubāḥ* purposes in *Waqfs* are permissible in Islamic law and that the purpose of a *Waqf* does not have to be a pious one.[120] He relies on a *Ḥadīth* for his opinion; in that *Ḥadīth*, prophet Mohamed states, 'Muslims are bound by their conditions save for conditions that prohibit that which is permissible, or permit that which is prohibited'.[121] What Almīmān implies is that conditions that do not prohibit the permissible or permit the prohibited are binding in any transaction or structure, and *Mubāḥ* conditions in *Waqf*s are acceptable and binding for that reason.

Most *Ḥanbalī* jurists do not allow a self-declaration of *Waqf* (*Waqf ʿala alnafs*),[122] because of the opinion discussed above that a *Waqf* can only be created for pious purposes.[123] While providing for one's family is a pious and charitable purpose, providing for oneself is not. According to the *Ḥanbalīs* that prohibit a self-declaration of *Waqf*, such a *Waqf* is only void if it has no other pious purpose, as, if it does have another pious purpose, the *Waqf* created will automatically and directly be upheld for that purpose.[124] Other *Ḥanbalīs*, however, have allowed self-declarations of *Waqf*.[125] Although both opinions have been attributed to Aḥmad Ibn Ḥanbal, the latter opinion is the prevailing one

118 Ibid.

119 Aḥmad Ibn Taymīyah, *Majmūʿ Fatāwaā Ibn Taymīyah*, vol 31 (Mujamaʿ Almalik Fahad 1995), 60 [translation my own].

120 Almīmān 102.

121 Moḥammad Altirmithī, *Sunan Altirmithī* (Dār Alkutub Alʿilmiyah), *ḥadīth* no. 1352, quoted in Almīmān 102.

122 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 247; Almirdāwī 16. The *Mālikī* and *Shāfiʿī* schools of thought also follow this opinion, see, Alḥaṭāb 25; Alqarāfī 432; Alramlī 367. In the *Ḥanafī* school, Abū Yūsuf allows the *Wāqif* to retain some benefit from the *Waqf* property, while Moḥammad does not permit a *Wāqif* to retain any benefit, see, Alkāsānī 220; Ibn Alhumām 225.

123 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 247.

124 Ibid. Contrast this with the English position in *Ministry of Health v Simpson* [1951] AC 251.

125 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 247; Almirdāwī 16.

in the *Ḥanbalī* school of thought.[126] While *Ḥanbalīs* are strict on the issue of pious purposes, those who allow self-declarations of *Waqf* do so bearing in mind the general long term benefit of such *Waqfs*: namely, that in time the founder of the *Waqf* will pass away and the benefit of such a *Waqf* will pass on to pious purposes.

The third condition for the validity of a *Waqf*, according to *Ḥanbalīs*, is the certainty of objects of the *Waqf*, whether they are individuals or purposes.[127] This is because the repercussions of inalienability and perpetuity that result from creating a *Waqf* are too grave for there to be uncertain objects.[128] Based on this condition, creating a *Waqf* for a beneficiary that is not yet in existence (*Waqf ʿala almaʿdūm*) is not permissible.[129] However, *Ḥanbalīs* differentiate between that which is essentially non-existent (*Almaʿdūm aṣlan*) and that which is essentially existent but has non-existent elements (*Almaʿdūm tabaʿan*).[130] An example of the first would be a *Waqf* for one's children who are not yet born.[131] They are non-existent and the *Waqf* would be created with uncertainty of objects. This is not permissible. An example of the second would be a *Waqf* for one's children, who are in existence, and their children, who are not.[132] Here the subjects of the *Waqf* are essentially certain and that is sufficient for the creation of a *Waqf*. Interestingly, despite requiring certainty of objects, the *Ḥanbalī* school of thought upholds *Waqfs* with no designated purpose or beneficiary.[133] The assumption, *Ḥanbalī*s maintain, is that the *Wāqif* created the *Waqf* for a pious purpose, and a charitable purpose will have to be discerned by the *Mutawallī*.[134] This is similar to the *cy-prés* doctrine in English trust law, though, in English law, the judge applies the *cy-prés* doctrine not the

126 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 247; Almirdāwī 18.

127 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 249; Almirdāwī 20.

128 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 249.

129 Ibid.

130 Ibid. The *Mālikī* school of thought allows such a *Waqf* saying that uncertainty can be alleviated by transferring the benefit to the nearest relatives of the *Wāqif* if he or she has no children, see Alḥaṭāb 22; Alqarāfī 423.

131 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 249.

132 Ibid.

133 The *Ḥanafī* and *Shāfiʿī* schools of thought state that a *Waqf* that has no designated purpose or beneficiary is void. See Alsarkhasī 32; Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 254.

134 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 250 & 251.

trustee.[135] However, as explained by Henry Cattan, the two doctrines operate differently,

> The *cy prés* doctrine aims at a judicial determination of a particular purpose to which the trust fund shall be applied which is as near to the settlor's intention as possible. Under Islamic law, there is no provision or machinery for such determination. It is assumed as a basic principle that the ultimate purpose of a waqf is charitable and, therefore, that the appropriation of the benefit of the waqf to the poor is a fulfilment of this purpose. Since the benefit of the poor is considered to be a residuary charitable object of a waqf, there is no necessity for a close scrutiny of the settlor's intention and careful construction of the trust instrument, as is required under the *cy prés* doctrine.[136]

The fourth condition for the validity of a *Waqf*, according to the *Ḥanbalī*s, is that the *Wāqif* creates an immediate unconditional, perpetual, inalienable, and irrevocable *Waqf*.[137] However, they do permit *Waqf*s that are conditional

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135 Hilary Lim, 'The Waqf in Trust' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing Limited 2001), 53.

136 Henry Cattan, 'The Law of Waqf' in Majid Khadduri and Herbery J. Liebesny (eds), *Law in the Middle East*, vol I (The Middle East Institute, Washington 1955), 207–208. However, some academics do question this comparison and label it as 'flawed'. See, Keith Christoffersen, 'Waqf: A Critical Analysis in Light of Anglo-American Laws on Endowments' (LL.M thesis, McGill University 1997), 98–99.

137 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 250; Almirdāwī 23. The *Ḥanafī* and *Shāfi'ī* schools of thought also agree with this condition, see, Ibn Alhumām 200, 214, & 220; Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 255; Alramlī 373. The *Mālikī* school of thought, however, allows temporary *Waqf*s, see, Alḥaṭāb 20. However, also according to *Mālikīs*, the default position is that a *Waqf* created is perpetual unless the *Wāqif* states otherwise, see ibid. 28. *Mālikīs* even allow for beneficiaries to collapse a *Waqf* if the *Wāqif* gives them that right in his or her *Waqf* deed. So, for example, he could create a *Waqf* for his children with the condition that they could sell it should financial difficulties arise for them, see ibid. 42–43; Alqarāfī 445–446. Further, *Mālikīs* also permit non-immediate conditional *Waqf*s, see ibid. 446. It is important to note that although most jurists hold that *Waqf*s must be irrevocable in theory, in practice, cases of revocable *Waqf*s have been reported. See Muhammad Zubair Abbasi, 'Sharī'a under the English Legal System: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law' (DPhil thesis, St. Hilda's College, Faculty of Law, Oxford University 2013), 97, who noted that there were such cases in British India. For example, *Beli Ram & Brothers v Chaudri Mohammad Afzal* (Lahore) [1948] UKPC 35; *Zafrul Hasan v Farid-Ud-Din* (Allahabad) [1944] UKPC 19.

on the *Wāqif's* death, on the evidence that this was done by ʿUmar, the second Muslim Caliph.[138] In that event, the *Waqf* will be part of the *Wāqif's* testament and it will therefore be subject to Islamic testamentary laws;[139] most importantly, the *Waqf* should not exceed a third of the deceased's estate and its beneficiaries must be Islamic heirs under Islamic forced heirship laws.[140]

The fifth and final condition for the validity of a *Waqf*, according to the *Ḥanbalī* school of thought, is that the *Wāqif* has legal capacity to settle a specific piece of property.[141] In addition to legally owning the property, the *Wāqif* must also be of sound age and mind (*Mukallaf*) and of sound management of his property (*Rāshid*).[142] This fifth condition was omitted by some *Ḥanbalī*s, such as Almirdāwī, because it is a condition applicable to all transactions and settlements, so impliedly it also applies to *Waqf*s. In reality, there is no disparity between the two opinions. Nevertheless, if all these five conditions are satisfied then a *Waqf* can be validly created in Islamic law, according to the *Ḥanbalī* school of thought.

There are other detailed intricacies in *Ḥanbalī Waqf* law that are worthy of a brief mention at this stage. In a charitable purpose *Waqf*, such as a *Waqf* for a mosque, ownership is transferred from the *Wāqif* to the deemed ownership of God.[143] If the *Waqf* was for a specific individual or a closed list of beneficiaries, deemed ownership of the *Waqf* will be transferred to the individual or closed list of beneficiaries.[144] Some *Ḥanbalīs* hold that the *Mawqūf ʿalyh* will always own the *Waqf*.[145] Family *Waqfs* are permissible under the *Ḥanbalī* school of

138 Albahūtī, *Kashāf Alqināʿ ʿan Matn Al'iqnāʿ*, 250; Almirdāwī 23.

139 Albahūtī, *Kashāf Alqināʿ ʿan Matn Al'iqnāʿ*, 250; Almirdāwī 24. The *Ḥanafī, Mālikī* and *Shāfiʿī* school also concur, see, Ibn Alhumām 204; Alqarāfī 424; Alramlī 373.

140 Yahya Bambale, *Acquistion and Transfer of Property in Islamic Law* (Malthouse Press Limited 2007), 65. For an overview of the Islamic testamentary laws, see Hamid Harasani, 'Islamic Law of Wills: An Overview' (2012) 9 Islamic Finance News 20.

141 Albahūtī, *Kashāf Alqināʿ ʿan Matn Al'iqnāʿ*, 251. The *Ḥanafī, Mālikī* and *Shāfiʿī* schools also require the fulfilment of this condition, see Alkāsānī, 219; Ibn Alhumām 200; Alqarāfī 423; Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 236; Alramlī 359.

142 Albahūtī, *Kashāf Alqināʿ ʿan Matn Al'iqnāʿ*, 251.

143 Ibid. 254.

144 Ibid.

145 Almirdāwī 38. Aḥmad is reported to have said that *Waqf* property does not leave the ownership of the *Wāqif*. See, Almaqdisī, *Almughnī* 4. The *Shāfiʿī* school of thought maintains that God will be deemed to own the *Waqf* in all types of *Waqf*, none else. See, Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 272; Alramlī 388. Though, the *Shāfiʿī* school also maintains that beneficiaries of a *Waqf* own its benefit; or, to put in English legal terms, have equitable ownership, see ibid. 389; Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 373. Some jurists, such as Albājī, in the *Mālikī* school of thought hold that *Waqf* ownership remains

thought; though, it appears that *Ḥanbalīs* do not require an ultimate charitable purpose—that comes into force once the descendants of the *Wāqif* become extinct—to be designated by the *Wāqif*.[146] Once a *Waqf* is created, and the property is settled, it is irrevocable and inalienable.[147]

2 Criticisms of *Waqf* System

Waqf law has been criticised both externally by Western legal commentators and internally by Islamic jurists and thinkers. Five main points have been raised against *Waqf*s. Some of these points can be rebutted briefly and with relative ease, while other points are more challenging and are worthy of deeper engagement. The aim here is not to illustrate that the main five criticisms of *Waqf* law are not true, for it is accepted here that they give a true account of the current state of *Waqf* law, regardless of the value of such an account. The aim, on the contrary, is to illustrate that some of these criticisms are indeed points of strength, not weakness, in *Waqf* law.

Additionally, with the criticisms that are more indicative of the contemporary malaise in *Waqf* law, the graver challenge is to establish whether Islamic law has in it the means to reform the laws of *Waqf*, either by bringing its own sophisticated hermeneutic structure to bear on the current *Waqf* law or by ascertaining whether and how imports of provisions of English trust law

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with the *Wāqif*, see Alḥaṭāb 18. In the *Ḥanafī* school, Abū Yūsuf and Moḥammad hold that a *Waqf* property is ownerless, see Alkāsānī 221; Ibn Alhumām 204. However, according to Abū Ḥanīfah, a *Wāqif* does not cease to own his property until a judge rules to that effect, see ibid. 203. This issue will be expanded upon in Chapter 4, which will discuss ownership theories.

146 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 277–292; Almirdāwī 74–95. The *Shāfi'ī* school of thought also appears to concur with this opinion. On one account in the *Shāfi'ī* school, if the descendants of the *Wāqif* expire, the benefit transfers to the nearest relatives of the *Wāqif* and so forth. Another opinion in the *Shāfi'ī* school holds that upon the expiration of the *Wāqif*'s descendants, the *Waqf* is transformed to a charitable *Waqf* for the poor. See Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 253; Alramlī 373–374. The *Mālikī* school also allows family *Waqf*s with no reference to an ultimate charitable purpose, see Alḥaṭāb 22–25. In the *Ḥanafī* school, Abū Ḥanīfah and Moḥammad hold that a *Waqf* is not valid unless the *Wāqif* designates an ultimate perpetual charitable purpose, so that it may exist perpetually. Abū Yūsuf only differs in that he believes one can imply an ultimate perpetual charitable purpose even if the *Wāqif* does not make it explicit, see Ibn Alhumām 213.

147 Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, 292; Almirdāwī 100; Alqarāfī 443.

could be used to reform the laws of *Waqf*. Put differently, the aim is to reform *Waqf* law for the use of private wealth-planning purposes. These criticisms are viewed as impediments to such reform. The key is to ascertain how such impediments could be alleviated either by re-engaging hermeneutically with the corpus of *Waqf* law or by resorting to the importation of relevant provisions of English trust law to aid the reformation process.

As mentioned above, there are five main challenges to *Waqf* law. First, family *Waqf*s are seen as an evasion of Islamic forced heirship inheritance law (*Farā'iḍ*).[148] Second, some view *Waqf*s as anachronistic and incapable of reform in this day and age.[149] Thirdly, as *Waqf*s are 'generally underdeveloped and poorly managed', the role of the *Mutawallī* has come into doubt.[150] Fourthly, inalienability is also seen as an impediment to reform.[151] Finally, the mandated perpetuity, as required by some schools of thought, has been criticised as a reason for the current state of *Waqf*s.[152] This is not to say that there have been no other challenges to the efficacy of *Waqf* law, for indeed there have been. Yet, the five mentioned here are the main challenges and almost all other challenges can fit under these main five. This chapter will discuss the first three challenges; separate chapters will be devoted to the fourth and fifth challenges.

2.1 *Evasion of* Farā'iḍ

The first challenge to *Waqf* law is that it can be used as an evasion of *Farā'iḍ*. Sir Roland Wilson was amongst the first oriental legal commentators to point out the issue of *Waqf*s evading *Farā'iḍ*.[153] In addition to this being a challenge brought by orientalist legal commentators, it also followed Shurayḥ and Abū Ḥanīfah in questioning the validity of *Waqf*s in Islamic law.[154] The challenge

148 Christoffersen 110.

149 Ibid. See generally Jeffrey A. Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic *Waqf*: A Comparison with the Trust' (1999) 32 Vanderbilt Journal of Transnational Law 1191.

150 Christoffersen 110.

151 Ibid.

152 Ibid.

153 Roland Knyvet Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities* (5th edn, W. Thacker & Co. 1921), 67–68. For example, *Waqf*s were created in British India as a result 'of the strict application of Islamic inheritance law on all types of movable and immovable property by the British Indian Courts', see Abbasi, 'Sharī'a under the English Legal System: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law', 55.

154 Their opinions were explained above.

was based on a *Ḥadīth* in which prophet Mohamed is reported to have said, *'Lā ḥabs ʿan farāʾiḍ Allah taʿālā'*, this translates to, 'there should be no *Waqf* that stays or evades the inheritance laws that Almighty God has ordained'.[155] However, Albayhaqī himself, the *Ḥadīth* scholar who reported this *Ḥadīth*, has declared that this *Ḥadīth* is more accurately a saying of Shurayḥ, not prophet Mohamed.[156] This being the case, it does not carry the same weight as a *Ḥadīth*. In any event, important and well-respected Islamic *Ḥadīth* scholars such as Alʿuqaylī, Althahabī, and Alzaylaʿī have declared that this *Ḥadīth* narration is weak.[157] In a separate narration, Albayhaqī relates the context of Shurayḥ's saying,

> ʿAṭāʾ ibn Alsāʾib said, 'I went to Shurayḥ in the time of Bishr ibn Marwān when Shurayḥ was a judge. I said to him, "I require a *Fatwā* (legal opinion)". He replied, "I am a *Qāḍī* not a *Muftī* (jurisconsult)". I said, "but by Allah I have not come with a grievance, a man in our neighborhood settled his house as a *Waqf*". Shurayḥ did not respond immediately but he later ordered his messenger to return to me and inform me that there should be no *Waqf* that stays or evades the inheritance laws that Almighty God has ordained.[158]

Shurayḥ's concern was that *Waqfs* would be used to contravene *Farāʾiḍ*. At the heart of this opinion lies a concern that the evasion of *Farāʾiḍ* is unjust in all circumstances. This opinion could be refuted in two ways: first, indirectly, by questioning the interpretation of Shurayḥ's opinion, and secondly, and more directly, assuming the commonly held interpretation of Shurayḥ's opinion is correct, by questioning its logic.

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155 Aḥmad Albayhaqī, *Alsunan Alkubrā* (Dār Almaʿrifah), *Ḥadīth* no. 11576. [my translation, it was based on Alkāsānī's interpretation of the *Ḥadīth*, see Alkāsānī 218].

156 Albayhaqī.

157 Moḥammad Alʿuqaylī, *Alḍuʿafāʿ Alkabīr*, vol 3 (ʿAbdulmuʿṭī Qalʿajī ed, 1st edn, Dār Alkutub Alʿilmiyah 1404AH), 397; Moḥammad Althahabī, *Mīzān Aliʿtidāl fī Naqd Alrijāl*, vol 3 (ʿAlī Albajāwī ed, Dār Almaʿrifah), 322; ʿAbdullah Alzaylaʿī, *Naṣb Alrāyah Liʾaḥādīth Alhidāyah*, vol 3 (Dār Alḥadīth), 477. Though it must be noted that a minority of *Ḥadīth* scholars claim that a version with a slight different wording of this *Ḥadīth* is *Ḥasan* meaning that it is fine and acceptable. The wording is, 'Lā ḥabs baʿd sūrat alnisā", meaning 'No *Waqf* is permissible after the revelation of the chapter of women [in the Quran]'. This chapter contains the provisions of inheritance law. See, for example, ʿAbdulraḥmān Alsuyūṭī, *Aljāmiʿ Alsaghīr fī Aḥādīth Albashīr Alnathīr* (Dār Alkutub Alʿilmiyah), *Ḥadīth* no. 9875.

158 Albayhaqī, *Ḥadīth* no. 11577 [my own translation].

One can start by analysing Shurayḥ's opinion using the Islamic interpretive practice known as the doctrine of 'Divergent Meaning' (*Mafhūm Almukhālafah*).[159] Kamali defines *Mafhūm Almukhālafah* as, 'a meaning derived from the words of the text in such a way that it diverges from the explicit meaning thereof'.[160] Using *Mafhūm Almukhālafah*, one finds the following: *a Waqf that does not evade Farā'iḍ is permissible*. If this is so, and given the perpetuity of *Waqf*s and mortality of *Wāqif*s, one has to ask, can there be a *Waqf* that does not evade *Farā'iḍ*? The answer is theoretically yes. One could settle his property in the exact proportions dictated in *Farā'iḍ*.[161] So, using *Mafhūm Almukhālafah*, Shurayḥ's opinion does not entirely prohibit *Waqf*s. Further, and more importantly, does Shurayḥ believe that all *Waqf*s that evade *Farāi'ḍ* are prohibited, or does he only prohibit such *Waqf*s if they come into existence in a testamentary *Waqf* after the *Wāqif* passes away? Both interpretations of Shurayḥ's opinion are possible; however, given the context of his saying, it is more likely that he intended that all *Waqf*s that evade *Farā'iḍ* are prohibited, even if they are created *inter vivos*. This is simply because the *Waqf* he was asked about was settled by a man *inter vivos*, and Shurayḥ's saying was in reference to that particular case. In brief, Shurayḥ's opinion could be reinterpreted to permit *Waqf*s that do not contravene *Farā'iḍ* but it would be far-fetched to suggest that Shurayḥ would allow any *Waqf* that evaded *Farā'iḍ, inter vivos* or otherwise.

This leads to the substantial criticism of Shurayḥ's opinion, which is the second criticism. If Shurayḥ did in fact intend that *inter vivos Waqf*s are invalid because they evade *Farā'iḍ* then it appears that this is logically questionable. This is so since, in Islamic law, without inflicting harm on other persons or groups, a person is free to use his property or transact in property just as he

159 It must be stated that there is no consensus on the use of *Mafhūm Almukhālafah*, as some schools such as the *Ḥanafī*s are weary of it and therefore use it sparingly. See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003), 175–176.

160 Ibid. 176.

161 In fact, when serving as a special legal advisor to Taylor Wessing LLP, I worked on a family trust for a Muslim client who settled his shares in the exact proportions allocated in *Farā'iḍ*. He also made sure that the recalculation of such shares would be continuous, meaning that next generations should also receive shares in accordance to their allocation in *Farā'iḍ*. Note that in estate planning, Middle Eastern clients have 'a general acceptance of the inheritance rules of Sharia law'. See, Richard Pease, 'Estate Planning for Middle Eastern HNWIs' [1998] Private Client Business 21, 22.

wishes as long as it is in a way that is adherent to Islamic law.[162] In his lifetime, a Muslim is not subject to or restricted by *Farā'iḍ*. A Muslim is perfectly free to gift all his property to a stranger in his lifetime and it would be preposterous to claim that he could not do so on the basis that it would evade *Farā'iḍ*. In his refutation of Shurayḥ's opinion, the Moorish jurist Ibn Ḥazm states, 'they [scholars] are in consensus that *inter vivos* gifts (*Hibāt*), lifetime charity (*Ṣadaqah*), and wills (*Waṣiyah*) are all valid and these transactions all evade *Farā'iḍ*'.[163] Amongst Oriental commentators, Christoffersen echoes Ibn Ḥazm's rationale,

> If one argues that making a *waqf* that primarily benefits certain family members, is an evasion of inheritance laws, one must also say that creating a *waqf* for charity, as well as the selling of property, the squandering of property, etc. all, technically, amount to the same thing.[164]

It may be that Shurayḥ's criticism is about the morality of the *Wāqif's* intention. He may object to someone gifting away his assets only *in order to* deprive his heirs of their rightful inheritance. This would be regarded as immoral. But policing intentions is notoriously difficult to do, and banning *inter vivos Waqf*s does not solve the problem.

In short, *Farā'iḍ* provisions are only triggered upon a person's death not before, and so it is an anomaly to state that a person cannot create a lifetime *Waqf* out of fear that he might evade a body of law that is not yet in force in his respect. This is further evidenced by the fact that Shurayḥ's opinion is no longer followed by any segment of Islamic legal scholarship. *Waqf*s conditional upon death, however, are another matter that has been dealt with above.

Christoffersen also argues that the mere conception of family *Waqf*s as an evasion of *Farā'iḍ* springs from an epistemic misconception about how Islamic property and estates laws operate. He elaborates,

> This equating of "religious" law with "Islamic" law has hampered the understanding of Islamic law and this is demonstrated by the reaction to family as valid beneficiaries of *waqf*. For family *waqf* seems out of place in "religious" or (to use Schacht's term) "pure" Islamic law. It is as though an

162 Sherman A. Jackson, 'Toward a Functional Analysis of Usul Al-Fiqh' in Bernard G. Weiss (ed), *Studies in Islamic Law and Society* (Brill 2002), 200.

163 'Alī Ibn Ḥazm, *Almuḥallā Bilāthār*, vol 8 (Dar Alkutub Al'ilmiyah), 152 [my own translation].

164 Christoffersen 115.

> endowment for family is too practical, too secular to be a part of "Islamic" law . . . From this, it would seem that the inheritance laws are "Islamic" while endowments for family are not. Western Islamicists are hampered by this dichotomous understanding of Islamic law . . . The fact is that the laws governing endowments for family, the laws of *waqf* in general, and the inheritance laws are part and parcel of the same Islamic law. This Islamic law is a bigger entity than "religious law" . . . if one is to question the legitimacy of endowments for families because it is a legal innovation outside of "pure" Islamic laws, then one must question the legitimacy of endowments period . . . by recognising that *waqf* became an integral component of the Islamic legal system, one can go a step further and observe that these two components of the Islamic legal system, the inheritance laws and the laws concerning endowments, are best considered as legitimate methods for the donative disposition of wealth.[165]

The idea that Islamic estates law solely comprises *Farā'iḍ* must be replaced by the true account of Islamic estates law that comprises four compartments that are not necessarily always in conflict; *Farā'iḍ* (Islamic forced heirship laws), *Waṣiyah* (Wills), *Hibāt* (Gift) and family *Waqf*s, the last two all being valid lifetime means of setting aside *Farā'iḍ* provisions.[166] In fact, David Powers believes that family *Waqfs* are '[t]he most important component of the Islamic inheritance system'.[167] Further, Muslims consider creating *Waqfs* to be just as pious as applying *Farā'iḍ*. Hennigan states, 'it is clear that the Muslim community considered these endowments to be acts of piety, or at the very least, believed that the pious motives of the founders' actions justified circumventing the Qur'ānic inheritance verses'.[168] In sum, family *Waqf*s do not evade *Farā'iḍ* provisions; rather, they are just as legitimate and pious. Most Muslims do not view family *Waqf*s as an escape route from *Farā'iḍ*. Family *Waqfs* merely allow Muslims to express their piety in a different way.

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165 Ibid. 114–115 & 117.

166 Ian Edge, 'Methods of avoidance of the fixed heirship rules in Islamic law: the Islamic trust' (2008) 14 Trusts and Trustees 457, 461.

167 David Powers, 'The Mālikī Family Endowment: Legal Norms and Social Practices' (1993) 25 International Journal of Middle Eastern Studies 379, 379, quoted by Christoffersen 116.

168 Hennigan xvi.

2.2 Waqf *is Incapable of Reform*

Schoenblum has argued that Islamic legal doctrine has played a large role in the *Waqf*'s demise.[169] Schoenblum contends, '*waqf* law has been largely unresponsive, especially in light of changing typologies of wealth and socio-economic conditions'.[170] Schoenblum attributes this 'failure to respond' to three main factors. First, he asserts that the *Waqf*'s 'divine grounding' makes it difficult for it to 'evolve in a responsive and uncontroversial manner', as the fundamentals of Islamic law must always be taken into account.[171] Second, Schoenblum argues that ' "divine" precepts of law' in Islamic countries have hindered the maximisation of wealth-planning opportunities.[172] Third, Schoenblum *rightly* blames legislation in Islamic countries for the *Waqf*'s decline. He states, '[l]egislation addressing the *waqf* has tended more to its overregulation or outright prohibition, sometimes accompanied by expropriation of property currently held in existing *waqfs*'.[173]

In response to Schoenblum's first point, it has been demonstrated above that while the basis of the law of *Waqf* is found in the divine Islamic sources, the intricate workings of the law itself is the product of *Ijtihād*. In fact, Alzargā holds that as the rulings of *Waqf* are the product of *Ijtihād*, they are subject to change when there is a change in custom.[174] Almīmān argues that *Waqf* laws are adaptable and they should change with time.[175] Ibn Bayyah, a contemporary *Mālikī* jurist, has written a book arguing for the concepts of utility and public benefit (*Maṣlaḥah*) as a main benchmark for the reformation of *Waqf* law, warning against the dangers of being 'overly ritualistic' when dealing with *Waqfs*.[176]

Maṣlaḥah is essentially a balancing exercise between generating maximum benefit and preventing harm, or at least minimising it.[177] Essentially, the maximisation of benefit and prevention of harm relates to five main areas. Hallaq explains, 'on the basis of a comprehensive study of *fiqh*, jurists came to realize that there are five universal principles that underlie the Shari'a, namely,

169 Schoenblum 1192.

170 Ibid.

171 Ibid. 1192–1193.

172 Ibid. 1193.

173 Ibid.

174 Alzargā, *Aḥkām Alwaqf*, 59–60.

175 Almīmān 147–148.

176 'Abdullah Ibn Bayyah, *I'māl Almaṣlaḥa fī Alwaqf* (Mū'assassat Alrayyāt 2005), 20–21 [my translation]. Also see, Mājid Al'umarī, *Aḥkām Alwaqf fī Ḍaw' Almaṣāliḥ Almursalah: Dirāsah Fiqhiah Usūliah* (1st edn, Dār Alkhalīj Lilnashr wal Tawzī' 2010).

177 Ibn Bayyah 74.

protection of life, mind, religion, private property and offspring'.[178] According to Ibn Bayyah, Islamic legal opinions (*Fatāwā*, sl. *Fatwā*) in the area of *Waqf*s should be based on what maximises the utility of *Waqf*s in a given socio-economic context.[179] Ibn Bayyah concludes, 'by induction, the general provisions of Islamic law and the specific provisions of *Waqf* law leave no room for doubt in saying that *Maṣlaḥah* is the correct concept with which to develop *Waqf* law'.[180]

Schoenblum's second point fails to explain why or how ' "divine" precepts of law' hinder wealth planning. Admittedly, Islamic financial laws morally govern Muslims and such laws prohibit a number of activities that are permissible by English law. However, this has not hindered Muslims, as it appears that they are capable of prospering financially in spite of such religious financial restrictions.

While Schoenblum's third point is conceded, it does not prove that *Waqf*s are incapable of reform, it merely illustrates that governments in a given period of time have treated *Waqf*s unfavourably. Claiming that this proves that *Waqf* law is incapable of reform would be like saying that colonial suppression of *Waqf* law proves the law is incapable of reform. In the end, Islamic law is a 'jurists' law and must be judged as such, and in determining whether *Waqf* law can or cannot be reformed, one must examine jurists' efforts not external factors that are not in their control.[181] In other words, we can only determine Islamic law's amenability to reform by looking at its content and by disregarding external factors such as regulation. Legislative intervention by totalitarian post-colonial governments is a factor that is outside jurists' control, and, in the area of *Waqf*, it is something that has never happened in the past.[182] In fact, according to Kozlowski, 'the history of endowments showed that more often

178 Wael Hallaq, *Shariah: Theory, Practice, Transformations* (Cambridge University Press 2009), 109.

179 Ibn Bayyah 25.

180 Ibid. 73 [translation my own].

181 Hallaq, *Shariah: Theory, Practice, Transformations* 546. Hallaq says, 'The *fiqh* was the intellectual and hermeneutical work of private individuals, jurists whose claim to authority was primarily epistemic, but also religious and moral. It was not political in the modern sense of the word, and it did not involve coercive or state power. Nor was it subject to the fluctuations of legislation, reflecting the interests of a dominant class. In its stability, but without rigidity, it represented an unassailable fortress within which the rule of law compared favorably to its much-vaunted modern counterpart'.

182 Mariam Hoexter, 'The *Waqf* and the Public Sphere' in Miriam Hoexter, Shmuel N. Eisenstadt and Nehemia Levtzion (eds), *The Public Sphere in Muslim Societies* (State University of New York Press 2002), 124.

they were a way of putting some distance between the state and crucial Islamic institutions'.[183] Hallaq explains, 'while Islamic law is tolerant of administrative competition, it is only thinly tolerant of substantive juristic intervention. The nation-state, on the other hand . . . had developed even less tolerance to legislative, administrative and bureaucratic competition'.[184] So, while it is accepted that emerging Muslim nation-states did legislate to overregulate—and in some cases even abolish—*Waqf*s,[185] the link between this and the claim that *Waqf*s' are doctrinally incapable of reform is unclear, especially as those who are primarily responsible for developing Islamic law, the jurists, played no role in these legislative interventions.

Nonetheless, it could still be argued, and Schoenblum indeed has, that the legislative interference by the nation-state in *Waqf* laws is 'an outgrowth of the failure of that law to adapt naturally in prior periods to radically different social and economic realities'.[186] This argument could be countered by first understanding the context in which such legislative challenges to *Waqf* laws occurred. Such legislative challenges occurred in a period in which the nation-state was first emerging in Muslim lands and with this, struggles over the control of property did take place. Hallaq explains the gravity of the introduction of the nation-state in Muslim lands, '[t]he most pervasive problem in the legal history of the modern Muslim world has therefore been the introduction of the nation-state and its encounter with the Shari'a'.[187] The main problem here is that a nation-state that did not have 'jural sovereignty' could not really call itself a nation-state.[188] So, for the nation-state to survive in Muslim countries in its early beginnings, it had to encroach upon jurists' monopoly on legal matters, and to do so, Islamic law had to give way to laws legislated by the nation-state.[189] The *Waqf*, being an immensely powerful tool of wealth control and all the power that rests with it,[190] was a perfect place to start the nation-state's

183 Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge University Press 1985), 2.

184 Hallaq, *Shariah: Theory, Practice, Transformations*, 361–262.

185 For example, Egypt abolished family *Waqf*s in 1952. See Christoffersen 102.

186 Schoenblum 1204.

187 Hallaq, *Shariah: Theory, Practice, Transformations*, 359.

188 Ibid. 362; Paul Stibbard, David Russell and Blake Bromley, 'Understanding the Waqf in the World of the Trust' (2012) 18 Trusts and Trustees 785, 795.

189 For a detailed discussion of this issue, see Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press 2008).

190 See Hoexter 120. She states, 'the *waqf* served as a major means through which the Islamic idea of the social order proper for the *umma* (the community of believers) was implemented'.

onslaught, an onslaught that Colonialists had already started earlier times. Stibbard et al. explain,

> The history of the waqf also needs to be understood in light of the expansion of empires and the need to control institutions of funding social welfare in colonial environments. The destruction of *Awqaf* in the Ottoman Empire and their exploitation by the British in colonial India have real parallels to the dissolution of the monasteries and chantry endowments by the Tudor monarchs in their struggle to win the allegiance of their people away from the pope.[191]

Schoenblum himself does not deny that power struggles over the control of private property did play some role in the *Waqf*'s decline, though he does not believe it was as major a role as the doctrinal rigidity of Islamic law.[192] However, not only did the emerging nation-states use the *Waqf*s as a political tool; so did Islamic jurists and legal thinkers. Eric Lewis Beverley, a historian, has questioned whether the early 20th century efforts driven by prominent Indian Muslim legal thinkers to revive *Waqf*s in British India were sincere. He asserts, '[w]ith the post-1857 restructuring of the colonial legal system, *waqf* rights became a central issue around which Muslim leaders could rally the community and challenge the workings of the state'.[193] In other words, according to Beverley, the *Waqf* revival cause was nothing more than a mask for the project challenging colonialism itself. *Waqf* law was a logical platform from which to challenge colonialism, as property and personal law are closely linked to notions of freedom and emancipation. Beverley adds, '[s]ince personal law generally, and the institution of *waqf* in particular, threw into question the limitations liberal thought placed on the religious sphere, Ali and Tyabji ultimately questioned the foundations of the colonial project itself'.[194] Additionally, Lim states, '[the] Islamic law of *waqf* endowment was enframed within the western orientalist gaze and, thereby repressed'.[195] Muslims rebelled using *Waqf* law because it was the very tool through which they became increasingly repressed.

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191 Stibbard, Russell and Bromley 791.

192 Schoenblum 1192.

193 Eric Lewis Beverley, 'Property, Authority and Personal Law: Waqf in Colonial South Asia' (2011) 31 South Asia Research 155, 162. Beverley mainly focuses on the works of Ameer Ali and Tyabji.

194 Ibid. 175.

195 Lim 52.

If this was true, then it explains why these Islamic legal activists expended much effort in defending *Waqf*s and little effort in substantially reforming *Waqf*s. The point is this: the fact that Muslim jurists spent little effort in reforming the *Waqf* does not necessarily mean it is incapable of reform. Further, if Beverley's theory holds then it explains why Muslim jurists spent little effort in attempting to reform *Waqf* law; their main project was to rally and polarise the masses against colonisation; all else could wait.

If *Waqf* laws were as rigid as Schoenblum believes, how would he account for the legal pluralism that is embodied in the four schools of thought with relation to the laws of *Waqf*? English trust law, in all its greatness, could not exist for a reasonable time without reformation and regeneration; if Islamic *Waqf* laws were so rigid, how could they remain in force for fourteen centuries, regardless of the religious attitudes of those who are governed by them. In the context of the role of *Waqf*s in conserving buildings in Zanzibar, Khalfan and Ogura note,

> [t]he waqf tradition has endured over 14 centuries of social, political, and economic turmoil since its inception in the medieval Islamic period and has thus shown its value in safeguarding land and building properties . . . One of the remarkable aspects that have helped to preserve *waqf* buildings is the evolutionary nature of the *waqf* itself . . . the *waqf* system has shown the ability to evolve in an organic way, adapt to different situations, and thus create a shield against various threats that have worked to undermine the buildings in its care. The shielding effect derives from its rules. And even though those rules are very strict, they are nonetheless flexible in the sense that Islamic schools of philosophy are allowed to issue logical, extended interpretations within the reasonable limits of Islamic charity law, thus making the *waqf* a dynamic system. It is the use of these interpretations that has allowed the application of innovative methods consistent with its charitable aims and that, depending on the prevailing situation, permits it to overcome practical problems involving unfamiliar political motives, various building conditions, and assorted financial hardships.[196]

Surely for such a long survival of *Waqf*s to occur, irrespective of *Waqf* laws' divine beginnings, doctrinal rigidity and backwardness could not be among

196 Khalfan Amour Khalfan and Nobuyuki Ogura, 'The Contribution of Islamic Waqf to Managing the Conservation of Buildings in the Historic Stone Town of Zanzibar' [2012] International Journal of Cultural Property 153, 154 & 171.

Waqf law's features. This does not absolve Islamic jurists of blame for the state of *Waqf*s; after all, on Beverley's account, they chose to use *Waqf* for superior political motives to combat colonialism as opposed to reforming its substantive legal workings, reserving only modest spaces in their doctrinal works for the discussion of *Waqf* law.[197] Cattan notes, '[i]n the case of waqf, there was, generally speaking, no evolution until the present time. It retained the rigidity of its original concept as devised more than a thousand years ago'.[198] This is not the result of inherent inflexibility but of historical neglect.

The jurists' failure to exercise *Ijtihād* to its full potential and their overreliance on the works of classical jurists in this area has meant that they have failed to carry the torch forward as those before them have. The rigidity is not, in reality, in *Waqf* laws, it is in those who have failed to revive them. However, using the example of the development of cash *Waqf*s, Hoexter asserts that this is now changing as Islamic jurists are increasingly willing to apply 'flexible interpretation of operative details' of *Waqf* law without undermining *Waqf* laws' 'basic principles or norms'.[199] This, it is hoped, will be the beginning of a long overdue modern engagement and regeneration of the laws of *Waqf*, as has been done many times in previous time periods and socio-economic contexts.

2.3 *Position of the* Mutawallī *and* Waqf *Management*

The mismanagement of *Waqf*s is by no means something new: according to Mohsin, it 'started in the Mamalik's time'.[200] Although this is a serious criticism, and one that is also conceded, it is more administrative than doctrinal. In other words, it has little to do with the internal workings of the laws of *Waqf* or the inherent nature of *Waqf* itself. If *Waqf* laws changed and its administration remained the same, this particular criticism would still hold true. Incompetence, mismanagement, corruption and fraud are features that would wreck the administration of any trusts system in the world; the situation regarding *Waqf*s is just an example of that. In addition, although mismanagement of *Waqf*s is an administrative problem, its gravity is such that it highlights the other current weaknesses of the *Waqf* system. Notwithstanding the need for reform that is pervasive across the various laws of *Waqf*, if this particular problem relating to *Waqf* management were resolved, many other problems

197 Kozlowski 13.

198 Cattan 217.

199 Hoexter 125.

200 Mohsin 61. The Mamalik were based in Egypt and ruled intermittently from the late 12th century AD until the early 19th century AD.

would not seem as major as they do now. Cristoffersen elaborates: '*waqf* could be administered in such a way that the problems associated with it could be resolved while still retaining the Islamic legal conception of endowments'.[201]

There is no doubt that *Waqf*s are 'grossly mis-managed' and many instances of encroachments upon *Waqf* properties have been reported across the world.[202] Muzammil went far enough as to say, '[p]eople have heard more of mis-conduct and breach than of integrity and efficiency'.[203] *Mutawallī*s' poor management of *Waqf*s has been such a major issue that Muzammil drastically believes that '[t]he ailing awqaf [Arabic plural of *Waqf*] organisations which have been created in the name of Islam bring a bad name instead of doing any service to the people they are meant for'.[204] Describing the situation in Nigeria, Oseni paints a typical picture found in most Islamic countries, '[i]n many situations, some of the waqf properties donated for the sake of Allah and for the benefit of the generality of people are transformed to inherited properties after the demise of the donor. These aberrant and woolly practices are becoming prevalent in many Muslim societies across the country'.[205] In India, for example, some reports have it that '70 per cent of Waqf property has been encroached upon'.[206] In Delhi alone, 77 per cent of *Waqf* properties have been occupied illegally.[207]

Islamic jurists spotted the potential dangers of *Mutawallī* corruption as early as the Middle Ages. Jurists such as Alqarāfī, who lived over 700 years ago in Egypt, warned that *Wāqif*'s onerous conditions would create situations where *Mutawallī*s found it impossible to administer *Waqf*s, which would lead to pushing them to subsequently embezzle its funds.[208] This indeed happened. Though, there are similar fears in common law of trustees defrauding beneficiaries and creditors. This cannot altogether be escaped but it can be limited by a combination of deterrent punishment and tight regulation in the first place.

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201 Christoffersen 125.

202 Mohammaed Muzammil, 'Organizational Control of Wakfs: The Islamic Approach' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publications 1998), 13; M.P. Dube, 'Management of Wakf Property in India' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publications 1998), 73.

203 Muzammil 14.

204 Ibid. 19.

205 Umar A. Oseni, 'Towards the Effective Legal Regulation of *Waqf* in Nigeria: Problems and Prospects' Available at SSRN: http://ssrncom/abstract=1478524 or http://dxdoiorg/102139/ssrn1478524 accessed 13 February 2013, 2.

206 Firoz Bakht Ahmed, 'In the name of Allah: Waqf corruption in India' *Deccan Herald*.

207 Ibid.

208 Alqarāfī 443.

Further, *Mutawallīs* are not rewarded sufficiently. Kirti and Kirti state, 'many aged and religious people who have devoted their whole life for the selfless service of such places, cannot even earn their bread from these properties'.[209] Even worse, some *Mutawallīs* are not even paid.[210] However, this is also the case with English trustees where, in general, they are not paid either. Private trustees receive no remuneration for their duties but they may be reimbursed for expenses incurred while carrying out those duties. Professional trustees (such as banks, solicitors, or professional trustee service providers), though, may charge a fee. In any event, while initial *Mutawallī*s may be incentivised to work regardless of financial rewards because of their affinity to the *Wāqif*, eventually, as *Waqf*s are perpetual, in a few generations after the creation of a *Waqf* and as new *Mutawallī*s seize control; they will have no sentimental connections with the *Wāqif* or, possibly, with his causes. This will potentially lead, and has undeniably led, to poor management and corruption.

Further, *Mutawallī*s are generally unqualified and professionally untrained. Not only can this lead to corruption and embezzlement by bad *Mutawallī*s, but it also leads to honest and law-abiding *Mutawallī*s running *Waqf*s incompetently, and failing to fulfil the *Waqf*s' true financial potential. For example, their poor management results in low profits from *Waqf* properties and 'unwise use of money so recovered'.[211] Because *Waqf*s are perpetual, the danger is that eventually inflation and the multiplying of beneficiaries across generations could render *Waqf* profits so low that beneficiaries are no longer interested in searching after such profits as the costs of doing so exceed the profits owed. The challenge is to develop the *Waqf* so that it can continuously match 'the present high costs and the standard of living'.[212] As *Mutawallī*s generally lack sufficient training and professionalism, many have failed at meeting this challenge.

Moreover, as *Waqf*s are perpetual and, as sentimental connections to the *Wāqif* or his causes are lost, outsiders can, and in many cases do, eventually attempt to encroach upon its funds.[213] Many *Mutawallī*s do not have the professional training to deal with these encroachments, and 'the shortage of funds does not allow them to engage good advocates',[214] which results in

209 Vijai Kirti and Tabassum Kirti, 'Wakfs: Need for Proper Management' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publications 1998), 79.

210 Muzammil 14.

211 Kirti and Kirti 80.

212 M.S. Baig, 'Administration of Wakfs and Wakf Properties' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publication 1998), 112.

213 Kirti and Kirti 80.

214 Ibid.

Waqf property often being 'squandered in vexatious and frivolous litigation'.[215] Conversely, as the encroachers have the prospect of receiving free property if they are successful, many are prepared to invest in good advocates to ensure their success. This in turn makes it more likely that the encroachers will succeed in their encroachment attempts. Although *Waqf* property may dwindle in value over the years, an encroacher would still find it a lucrative prospect for, unlike the growing number of beneficiaries, he is only one. In other words, while beneficiaries may end up getting crumbles of the pie, he may get the pie itself, or a considerable slice of it.

Some have argued that as *Waqf*s are irrevocable, another serious problem is that a *Waqf* 'cannot be cancelled in the event of mismanagement at any time in future by the maker of wakf'.[216] However, mismanagement does not have to be remedied by 'cancelling' the *Waqf*; it can be remedied by making the *Mutawallī* liable for his actions both civilly and criminally if the circumstances necessitate that. Muzammil has hinted that *Mutawallī*s are restricted in their activities as a result of the religious nature of *Waqf*s. In other words, he believes that the religious nature of *Waqf*s can be a hindrance. In his words, '[Islam] places a greater emphasis on the spiritual value of work than it does on the materialistic outcome'.[217] This is no excuse for the mismanagement of *Waqf*s or for their weak returns because, in the case of *Waqf*s, maximising material returns correlates with increasing spiritual value, as with increased returns comes increased benefit to beneficiaries, and with increased benefit, the *Wāqif* receives increased reward from God. In sum, the current state of *Mutawallī* management of *Waqf*s is unprofessional, 'undemocratic', 'unresponsive',[218] and, more dangerously, unregulated.

Some critics believe that the solution to *Mutawallī* mismanagement lies in centralising management powers in the hands of a single direct governmental committee.[219] However, *Waqf* centralisation does not come without its problems. Firstly, in a difficult economic period, and for the *Mutawallī*s who are remunerated by the *Waqf*, it creates unemployment.[220] Secondly, centralising *Waqf* management does not mean that mismanagement will not occur on institutional levels as well. Mohsin notes,

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215 Dube 73.

216 Ibid. 71.

217 Muzammil 16–17.

218 Kirti and Kirti 81.

219 H.Y. Siddiqui, 'Wakf Management in India' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publications 1998), 46.

220 Mohsin 62.

> . . . mismanagement took place within the institution itself, as most of the waqf properties were managed by appointed trustees who had no intention of protecting these properties other than getting their monthly salaries or having the opportunity to keep more money from the waqf revenues for themselves. This, in turn, left most of the waqf properties idle and neglected.[221]

Mohsin therefore recommends that 'founders' should continue 'to administer their own waqf' with a 'supervisory body' monitoring their activity and punishing mismanagement.[222] This, however, is not enough. If the whole practice of *Waqf* management is not rethought, then the ailments resulting from poor *Waqf* management will reoccur and continue to plague *Waqf*s. The problem is not really about *Waqf*s themselves or *who* runs them; it is about *how* they are run.

It must be made incumbent upon prospective *Mutawallī*s to seek professional training and meet professional practice requirements.[223] There is a 'lack of education [for *Mutawallī*s] in modern practice'.[224] Boudjellal states,

> [m]anaging real estate assets requires special skills that can not be provided by financial asset managers, and *vice versa* . . . But realization of such an objective is conditioned by what we have called the institutionalization of *nadhārah* [*mutawallī*ship or trusteeship] . . . Because of the lack of an institutionalized *nadhārah*, most waqfs have been lost.[225]

Professional training should lead to an increase in the 'productivity of waqf properties' and a decrease in 'fraudulent practices and corruption by the waqf managers'.[226] However, for that to be ensured, better regulations of *Waqf* management practices need to be put in place. Governments, while remaining within the spirit of Islamic law in general and *Waqf* law in particular, need 'to provide sufficient checks and balances on' the management of *Waqf*s.[227]

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221 Ibid.

222 Ibid. 64.

223 Saleem Akhtar, 'Wakf Administration: How to Streamline' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publication 1998), 95.

224 Noor Mohammad, 'Development of Wakfs: A New Perspective' in S.K. Singh (ed), *Wakf Administration: Status and Issues* (Spellbound Publication 1998), 121.

225 Boudjellal 127–128.

226 Budiman and Kusuma 13.

227 Ibid.

Islamic jurists must be empowered to play a role in scrutinizing government in this aspect, to make sure that *Waqf* law is not simply overlooked or refashioned as the rule or ruling party see fit.

Another solution proposed is the introduction of multiple *Mutawallī*s. Muzammil holds, '[i]n order to ensure efficiency, it has rightly been suggested that as far as possible instead of a single Mutawalli, the management of waqf property be done through committees'.[228] Multiple *Mutawallī*s, who might also be jointly and severally liable, will create internal checks and balances on *Waqf* management. Also, if diversity were sought in the skills of the multiple *Mutawallī*s appointed, it would maximise the efficiency of *Waqf* management and in turn maximise *Waqf* returns. So, instead of searching for one *Mutawallī* who possess the wider range of skills possible, different qualified *Mutawallī*s could be appointed for the different tasks required. For example, a *Mutawallī* who had a legal background, another with a financial background, and a third with a background in management, and so forth. However, to achieve this prospect, there must be an abundance of diversely qualified *Mutawallī*s, or a profusion of professionals in different sectors who are willing to act as *Mutawallī*s. For this to occur, financial rewards for *Mutawallī*s need to be more lucrative. In other words, *Wāqif*s need to be encouraged to allow for more generous provisions for *Mutawallī*s to attract the best and most qualified professionals.

Whereas some of the problems with the state of *Waqf* management are related to major doctrinal problems such as irrevocability and perpetuity, the problem of *Waqf* management is largely an administrative one. If reforms are made to make *Waqf* management more professional, then many professional *Mutawallī*s will understand the administrative problems related to substantive *Waqf* laws such as those mandating perpetuity, and learn how to avoid such problems. For example, regardless of the merit of the laws mandating perpetuity, perpetuity itself does not necessarily cause mismanagement. However, if perpetuity is coupled with unprofessional and underpaid personal *Mutawallī*s who have little or no sentimental connections with the *Wāqif*, the likelihood of mismanagement increases. The current state of *Waqf* management should not be used to exploit the core doctrinal *Waqf* issues that are aggravated by weak *Waqf* management, and are not a cause of weak *Waqf* management.

2.4 *Inalienability and Perpetuity*

In this subsection, I will briefly outline these two criticisms. Because of their complexity, I shall discuss each in more depth in separate chapters. These are doctrinal and jurisprudential criticisms that strike at the heart of the concept

228 Muzammil 14.

of *Waqf*s. Moreover, they are also the two features that markedly distinguish *Waqf*s from trusts. Whereas the *Waqf* is inalienable and perpetual, the trust is alienable and not perpetual. In these two areas, the trust is the antithesis of the *Waqf*. However, being the antithesis of trusts is not necessarily a flaw, but it can be an indicator of the incompatibility of the two systems.

The criticism levelled at the *Waqf* on this point is that mandating perpetuity is 'increasingly injurious' and 'catastrophic from an economic standpoint'.[229] Over generations, the number of beneficiaries entitled to the unchanged *Waqf*'s usufruct increases, meaning that beneficial shares continuously decrease in value.[230] This gradually decreases the utility of *Waqf*s until a stage is reached where the beneficiaries become 'disinterested' and lose 'motivation to hold the *mutawallī* accountable', creating the problems with *Waqf* management that were discussed in the previous section.[231]

The inalienability of *Waqf*s has been criticised because it immobilises property, and the effect of this 'is that property made waqf cannot be the subject of any sale, disposition, mortgage, gift, inheritance, attachment, or any alienation whatsoever'.[232] This, it is said, largely restricts the power of the *Mutawallī* to manage a *Waqf*. Schoenblum notes, '[s]ince the *mutawallī* does not own the property in any sense, he cannot deal with it except in the very particular ways permitted by the religious law'.[233] According to Christoffersen, inalienability of *Waqf*s creates a 'paradox' where 'the initial owner has complete freedom of alienation, but having exercised it, limits the freedom of alienation of the ensuing owners'.[234] The issue of inalienability is in fact an issue of the *Waqf*'s ownership structure; it is seen as inalienable because nobody holds the *Waqf* property, God is the deemed owner. *Waqf* ownership will therefore have to be explored and compared with trust ownership theories in attempt of finding reconciliation.

Inalienability and perpetuity are linked. A measure of inalienability must exist for property to be endowed perpetually, and, commonsensically, property that is perpetually endowed must be inalienable, for if it were alienable it would not be perpetual. Inalienability is not absolute in Islamic law, in some circumstances a *Qāḍī* can sanction the sale and replacement of *Waqf* property in what is known as *Istibdāl*. The challenge here is twofold. Firstly, Islamic

229 Schoenblum 1206; Cattan 217.
230 Schoenblum 1207; Cattan 217.
231 Schoenblum 1207; Cattan 217.
232 Cattan 208.
233 Schoenblum 1218.
234 Christoffersen 23.

Waqf law must be studied in depth to discern the nuances of inalienability and perpetuity and to determine the legitimacy and workability of those interpretations that allow temporary *Waqf*s and are more liberal on the issue of inalienability. Secondly, accepting the mainstream interpretations that *Waqf*s are perpetual and rigidly inalienable, the utility of perpetuity and inalienability must be demonstrated. Christoffersen asserts,

> The challenge for Islamic law is not only to demonstrate the utility of continuing to allow founders the freedom to make property perpetually inalienable for public purposes, but also to demonstrate the utility of allowing a founder to create perpetual endowments for family interests.[235]

But, measuring economic utility is only one index of measurement. It is neither the only one, nor necessarily the best one; rather, it is the most objective yardstick upon which *Waqf*s and trusts' economic performance can mutually be gauged. From a public policy perspective, this is most likely to be the best indicator. Engaging with these two criticisms is a lengthy process and, as explained above, the discussion will be conducted in the specifically devoted chapters.

3 The Epistemic Difficulties of Attempting to Reform *Waqf* Law Outside its Internal Hermeneutic Model

Despite the richness and legal pluralism that is the distinctive feature of *Waqf* law, some have argued that reforms or solutions to *Waqf*s' problems should come from external sources. Andrew White has proposed reforms to *Waqf* law that would make *Waqf*s very similar if not identical to trusts. For our purposes, in the context of family *Waqf*s, I will only discuss two of his proposed reforms. First, he suggests that family *Waqf*s should remove the requirement of an ultimate 'religious, pious, or charitable' purpose.[236] Second, he proposes that the perpetuity requirement should be abandoned.[237] While White does make policy arguments to justify his proposed reforms, he does not support

235 Ibid. 83–84.

236 Andrew White, 'Breathing New Life into the Islamic *Waqf*: What Reforms can *Fiqh* Regarding *Awqaf* Adopt from the Common Law of Trusts without Violating *Shari'ah*?' (2006) 41 Real Property, Probate and Trust Journal 497, 520–521.

237 Ibid. 525.

his argument with Islamic legal doctrine. Even if one assumes that Islamic law accepts his reforms, the fact that he does not couch his argument in a way that is backed by Islamic legal doctrine undermines it from an Islamic perspective. The reason the whole system of *Waqf* is respected and held to be pious by Muslims is that 'it is governed by a law considered sacred'.[238] Unfortunately, some Western writers have portrayed *Waqf* law as rigid and have 'exaggerated its inefficiencies'.[239] In any event, reform efforts cannot be arbitrary and merely policy driven, they must make a real effort to find justification in Islamic legal doctrine.

The real solution lies in meticulously researching the Islamic legal system, for many of the answers may lie in it. In response to White, and also ironically in strengthening his argument, it has been demonstrated earlier in this chapter that the Islamic law of *Waqf*s does harbour interpretations by some schools of thought that neither require the 'ultimate charitable purpose' in family *Waqf*s, nor require *Waqf*s to be perpetual. Promoting these two interpretations would achieve exactly what White has called for; only it will achieve it in a way that is justified from an Islamic legal perspective. My criticism of White's position could be viewed as merely semantic. However, semantics, in this highly sensitive area, make all the difference on whether a reform is viewed as justified from a perspective internal to a legal system, or not.

There is no reason to import laws or concepts into *Waqf* law if *Waqf* law already has them. If there were an interpretation in *Waqf* law that allows for temporary *Waqf*s, then endorsing that interpretation would be a more genuine attempt at reforming *Waqf*s than importing the common law rule against perpetuities, assuming, of course, that perpetuity is undesirable.[240] Reforming from the inside also illustrates that the legal system still works and is able, and aptly equipped, to meet modern challenges. Imposing external solutions is essentially a refashioning attempt; an attempt at holistically replacing one structure with another. It is also a declaration that *Waqf* law has failed to meet its challenges. Accordingly, such attempts must be made sparingly. This does not mean that all *Waqf* law reforms should be internal. Where exhaustive research shows that *Waqf* law has no internal solution to a modern challenge, foreign solutions can be imported provided that they are put through the *Ijtihād* process to discern their compatibility with *Waqf* law's objectives

238 Timur Kuran, 'The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System' (2001) 35 Law and Society Review 841, 842.

239 Ibid. 889.

240 The issue of the desirability, or undesirability of perpetuities will be elaborated in the chapter dedicated to the discussion of perpetuity in *Waqf*s.

and Islamic law in general.[241] This way, solutions will be more genuine and the integrity of the *Waqf* institution and its laws will remain intact.

Conclusion

After explaining some important intricacies of Islamic *Waqf* law, according to the *Ḥanbalī* school of thought, this chapter has engaged with the five main criticisms levelled at the current states of *Waqf* law in modern times, arguing, generally, that Islamic law has the potential to rise above them. Whether it does is a different matter. Regarding the accusation that *Waqf*s evade of *Farā'iḍ*, it has been shown that this is not the case as, coupled with *Farā'iḍ, Waṣāyā* and *Hibāt, Waqf* law was designed to be part and parcel of Islamic estates law and is therefore not in conflict with it. The chapter then dispelled the claim that *Waqf* law is incapable of reform by affirming that the laws of *Waqf* were primarily the product of *Ijtihād*, and this being the case, they are not set in stone. The criticisms directed at the state of *Mutawallī* management are accepted, though the blame for this state of affairs does not wholly lie with the substantive laws of *Waqf*. Reforms such as professional training of *Mutawallī*s, deterrent retribution for *Waqf* fund embezzlement and stricter governmental regulation in this area have been proposed. The criticisms aimed at perpetuity and inalienability have been explained but not thoroughly engaged with, as separate chapters will be devoted to discussing these two important issues. Finally, an epistemic argument was made against reforms that were externally designed and that did not go through the Islamic *Ijtihād* machine. While, ultimately, these reforms may be compatible with Islamic law, their external and therefore 'un-sacred' method of generation would make them repugnant to adherents of Islamic law.

241 The process of doing so was described in Chapter 1 in discussing methodology.

CHAPTER 3

Exploring the Tension between the *Waqf*'s Perpetuity Laws and the English Trust's Rule against Perpetuities

While the last chapter presented an overview of *Waqf* law, defining a *Waqf*, explaining its foundations, fundamentals, and highlighting its main criticisms, this chapter will focus on the issue of perpetuity in private family *Waqf*s, a main criticism of *Waqf*s that is worthy of closer attention. Western writers on *Waqf*s have largely focused on the Islamic opinion mandating perpetuity in family *Waqf*s without paying much attention to other equally valid opinions in the corpus of Islamic law. This standpoint, coupled with the rigidity of the common law rule of perpetuities, as seen by some, has meant that *Waqf* law and the law of trusts have been viewed as irreconcilable. This chapter will critically engage with both these notions and show that reconciliation is possible on two levels.

On the one hand, this chapter will argue that it is not self-evident in Islamic law that family *Waqf*s should be perpetual, and for that reason some schools of thought do not make it incumbent upon a family *Waqf* to be perpetual. On the other hand, this chapter will also argue that the common law can theoretically accommodate perpetual private trusts, and, in some jurisdictions, it has done so. This will show the broad scope for reconciliation that exists, if only effort was expended in eliciting less mainstream interpretations of law and policy.

However, before suggesting reconciliation, one must understand what is sought to be reconciled. Therefore, the chapter will begin by explaining Islamic law's stance on perpetuity, followed by English law's stance, leading up to a discussion of the tension that exists between the two legal systems. A section will also be devoted to discussing the British colonial legal treatment of family *Waqf*s. This discussion will aid in understanding how the conflicting mainstream stances on perpetuity played out practically in the past, highlighting the need for reconciliation.

1 Islamic Law's Mandated Perpetuity in Private Family *Waqf*s: Exploring the Various Schools of Thought

As was mentioned in chapter 2, the *Waqf*'s perpetual nature has been one of its main criticisms. Fuelled by antagonism against 'dead hand control', Cattan

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suggests that the mandated perpetuity in *Waqf*s is 'catastrophic from an economic standpoint'.[1] Alwardī, an Iraqi sociologist who died in 1995, said that family *Waqf*s are a product of 'bedouin arrogance that goes against the spirit of Islam'.[2] The challenge for Islamic jurists, Christoffersen believes, is 'to demonstrate the utility of allowing a founder to create perpetual endowments for family interests'.[3] Before doing so, it is equally important to ascertain whether mandated perpetuity in Islamic law is as well established and self-evident as is implicitly made out by writers such as Cattan, Schoenblum, and Christoffersen.[4]

Three out of the four schools of thought in Islamic law declare that as a condition for its validity, a *Waqf* must be perpetual.[5] For the *Mālikī* School of thought, the default position is still that a *Waqf* is (but does not have to be) perpetual, except it allows a *Wāqif* to opt out of this default position and create a temporary *Waqf*, provided that he makes his intention clear.[6] Not only do *Mālikīs* allow temporary *Waqf*s, they also allow *Waqf* beneficiaries to collapse a *Waqf* if the *Wāqif* gives them the power to do so.[7] This interpretation is similar but not identical to the rule established in *Saunders v Vautier* that allows beneficiaries to collapse a trust and compel the trustee to transfer legal title to them, if all the beneficiaries agree to this.[8] The difference in the *Mālikī*

1 Henry Cattan, 'The Law of Waqf' in Majid Khadduri and Herbery J. Liebesny (eds), *Law in the Middle East*, vol I (The Middle East Institute, Washington 1955), 217.

2 'Alī Alwardī, *Wu'āth Alsalāṭīn* (Dār Kūfān Lilnashr 1995), 127 [translation my own]. It is important to note that although Alwardī is a famous Arab sociologist, his statement bears no authority in the field of Islamic law.

3 Keith Christoffersen, 'Waqf: A Critical Analysis in Light of Anglo-American Laws on Endowments' (LL.M thesis, McGill University 1997), 83–84.

4 Jeffrey A Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic *Waqf:* A Comparison with the Trust' (1999) 32 Vanderbilt Journal of Transnational Law 1191, 1206.

5 For the *Ḥanafī* school, see Ibn Alhumām, *Fatḥ Alqadīr*, vol 6 (Dār Alfikr), 200, 214 & 220; 'Abdullah Almūṣilī, *Alikhtīar Lita'līl Almukhtār*, vol 3 (Dār Alkutub Al'ilmīah), 43. For the *Shāfi'ī* school, see Aḥmad Ibn Ḥajar Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, vol 6 (Dār 'iḥyā' Alturāth Al'arabī), 255; Mohammad Alramlī, *Nihāyat Almuḥtāj Sharḥ Alminhāj*, vol 5 (Dār Alfikr 1984), 373. For the Ḥanbalī school, see Manṣūr Albahūtī, *Kashāf Alqinā' 'an Matn Al'iqnā'*, vol 4 (Dār Alfikr wa 'alam Alkutub 1982), 250; 'Ali Almirdāwī, *Al'inṣāf fī Ma'rifat Alrājiḥ min Alkhilāf*, vol 7 (2nd edn, Dar 'Iḥyā' Alturāth Al'arabī), 23.

6 Moḥammad Alḥaṭāb, *Mawahib Aljalīl Sharḥ Mukhtaṣar Khalīl*, vol 6 (3rd edn, Dār Alfikr 1992), 20 & 28.

7 Ibid. 42–43; Aḥmad Alqarāfī, *Althakhīrah*, vol 5 (1st edn, Dār Alkutub Al'ilmīyah 2001), 445–446.

8 *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282. Paul Matthews has traced the origins of the rule in *Saunders v Vautier* to earlier cases. See *Lord Pawlet's case* (1685) 2 Vent 366; *Barnes v*

interpretation is that it only allows *Waqf* beneficiaries to collapse a *Waqf* if a *Wāqif* gives them that specific power. While in common law, *Saunders v Vautier* is based on the idea that the power to create a trust 'should not be used to allow an owner to control his beneficiaries when they are fully competent'.[9] In other words, the difference is that the power of the beneficiaries to collapse a trust under *Saunders* flows from the fact that the beneficial interest is in their property. In a *Waqf*, the default standpoint is that beneficiaries do not have proprietary rights, unless, in a specific situation detailed in *Mālikī* law, the *Wāqif* gives them such rights.

As an extension of their view allowing temporary *Waqf*s, *Mālikī*s have allowed family *Waqf*s without referring to an ultimate charitable purpose.[10] This is a logical consequence of their opinion; if temporary *Waqf*s are permissible, then laboured interpretations or provisions ensuring perpetuity are not necessary, the *Waqf* could last for as long as the *Wāqif* desires, or for the time necessary for it to achieve its purpose.

The *Ḥanafī*s are on the other side of the spectrum. *Ḥanafī*s are strict in holding that all *Waqf*s must be perpetual. So, if a *Waqf* has even a remote chance of not being perpetual because of the possibility of beneficiary extinction, as is the case in a family *Waqf*, the *Wāqif* must initially designate an ultimate charitable purpose to take effect if that eventuality arises. Whereas in the common law it had to be certain that an interest must vest in the perpetuity period and any remote possibility that the interest might vest outside the perpetuity period would invalidate the trust,[11] in *Ḥanafī* doctrine, it has to be certain that the *Waqf* will be perpetual, and any remote possibility that it will not be will invalidate the *Waqf*.

As stated above, Western commentators view the *Ḥanafī* formulation of family *Waqf*s as the mainstream Islamic opinion. A number of factors can explain this: crucially, for the purpose of this chapter, *Ḥanafī* law governed Britain's most important Islamic colonies, and the majority of Muslims in British India adhered to the *Ḥanafī* School of thought. Subsequently, *Ḥanafī*

Rowley (1797) 3 Ves Jr 305; *Dawson v Hearn* (1831) 1 Russ & My 606; *Love v L'Estrange* (1727) 5 Bro PC 59; *Barton v Briscoe* (1822) Jac 603 quoted in Paul Matthews, 'The Comparative Importance of the Rule in Saunders v. Vautier' (2006) 122 Law Quarterly Review 266, 267.

9 J.E. Penner, *The Law of Trusts* (7th edn, Oxford University Press 2010), 67. Penner also notes at p. 67, 'the principle [in *Saunders v Vautier*] allows the beneficiaries to collapse the trust, *not* to 'micro-manage' the trust by telling the trustee how to exercise his powers and discretions'.

10 Alḥaṭāb 22–25.

11 The advent of the 'Wait and See' rule in the common law has softened this. See s.7 Perpetuities and Accumulations Act 2009.

works were the first to be translated into English and until this day the *Ḥanafī* School of thought is more accessible in English than the other three schools of thought.[12]

1.1 *The Rationale Behind the Mandatory Perpetual Requirement*

There has also been much confusion surrounding the understanding of the mandatory perpetual requirement of family *Waqf*s. In its specialist analysis, Lexis Nexis Butterworths (LNB) attempt to elucidate the meaning of perpetuity, '[f]or Muslim scholars, perpetuity means that property cannot revert to the donor, not that the property must always serve the original purpose of the endowment'.[13] LNB's definition seems to confuse matters for the following reasons. First, perpetuity would mean that the property could not revert to the donor in both Islamic and common-law understandings. Second, while the meaning of 'purpose' in ordinary language is clear, in this context using it free of any qualification only leads to confusion. 'Purpose' in common-law terminology refers specifically to a purpose trust, such as a charitable trust, and is not used to describe trusts for beneficiaries. Although, it is most likely the case that LNB meant 'purpose' in its wider generic sense, including that of benefiting a (human) beneficiary.

From an Islamic legal perspective, the assumption is that perpetuity *would* entail that the *Waqf* will always serve the ultimate purpose, unless the settlor states otherwise. To be more accurate, perpetuity in Islamic law is the idea that a *Waqf* will eternally serve the ultimate purpose designated by the settlor, but allows room for intermediary beneficiaries if the settlor so wishes.[14]

In his digest on Anglo-Muhammadan law, Sir Roland Knyvet Wilson puts his theory forward regarding perpetuity in Islamic law, '[t]he true principle may be, and I think is, that the essence of *wakf* is *perpetual immobilization*, and that the declaration of a religious or charitable purpose is only one of several possible ways of indicating that perpetual immobilisation was intended'.[15] Sir Roland appears to have confused the means with the end. It would be

12 For example, Hamilton's translation of Hidaya, a *Ḥanafī* manual, was completed around 1780. See Burhanuddin Marghinani, *The Hidaya: The Classic Manual of Hanafi Law* (Z Baitner ed, Charles Hamilton tr, Darul Ishaat 2005).

13 'The Islamic Law of Waqf' *Lexis Nexis Butterworths News* (16/05/2001) 46.

14 Common law courts in colonial times have warned against 'superficial analogies' between the English law against perpetuities and the Islamic law for perpetuities. See *Bikani Mia v Shuk Lal Poddar* (1893) ILR CAL 116, 123.

15 Roland Knyvet Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*

counter-intuitive to believe that any legal system would aim to 'tie-up' property perpetually as an end in itself, having charitable or other purposes as means to achieve that end. A better explanation would be to reverse Sir Roland's theory by saying that the essence of a *Waqf* is to serve charitable or religious purposes, with 'perpetual immobilisation' being a means to achieve that initial purpose.[16]

Having established that perpetuity is an essential feature of *all Waqf*s in the *Ḥanafī* School of thought, it is now important to explain why the ultimate charitable purpose is crucial for the validity of a family *Waqf* in the *Ḥanafī* School. Even if the settlor designates that a *Waqf* is constituted for the perpetual benefit of a beneficiary or a class of beneficiaries, theoretically, that beneficiary or class of beneficiaries *could* become 'extinct'. This undermines a *Waqf*'s perpetual nature, regardless of how remote the possibility of extinction is. In other words, while in its obsession to avoid perpetuity English law assumes families will never die out,[17] according to *Ḥanafī*s, Islamic law, in its obsession with perpetuity, assumes that they eventually will. This is why *Ḥanafī*s hold that a *Waqf* would be void if its beneficiaries were persons or a class of persons that were capable of becoming extinct (e.g. descendants), unless that *Waqf* had an ultimate charitable purpose.[18] By contrast, The *Mālikī* School, allowing temporary *Waqf*s in the first place, allows family *Waqf*s without need for further legal justification.[19]

Still, the issue of an 'ultimate charitable purpose' is a source of confusion as it implies that, from an Islamic legal perspective, providing for one's family is not charitable. By contrast, in Islamic law, providing for one's family is an act of charity in its own right, be it in a *Waqf* or otherwise.[20] In a Prophetic tradition, prophet Mohammad said, 'Giving money to the poor is charity, and giving money to your relatives counts as two acts of charity'.[21] This was even acknowledged in a colonial Privy Council case:

(5th edn, W. Thacker & Co. 1921), 481. The discrepancy in spelling immobilisation was in the text and I left it as is.

16 Muṣṭafā Alzargā, *Aḥkām Alwaqf*, vol 1 (2nd edn, Dār Ammār 1998), 54. Alzargā, a modern *Ḥanafī* jurist, states that perpetuity relates to the perpetual nature of the *Waqf*'s purpose.

17 *Jee v Audley* (1787) 1 Cox 324, 29 ER 1186.

18 Moḥammad Alkubaysī, *Aḥkām Alwaqf fī Alsharī'ah Alislāmīyah*, vol 1 (Maṭba'at Alirshād 1977), 413 & 419.

19 Ibid. 428.

20 Ibid. 176.

21 Moḥammad Nāṣir Aldīn Alalbānī, *Ṣaḥīḥ Altarghīb wa Altarhīb* (5th edn, Maktabat Alma'ārif), no. 892. [My translation].

> The theory of the deed seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a meritorious purpose. *It is superfluous at the present day to say that this is not the law*.[22]

This is why, in their submissions for the appellants in *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed*, Dingle Foot Q.C. and R.K. Handoo warned against assuming that charity in Islamic law has the same meaning as it does in the common law, '[w]hat is charitable according to Muslim law must be approached with caution. Difficulties arise if one attempts to apply the English conception of charity. In Muslim law one of the best charitable objects is one's family'.[23]

To add to the confusion, an 'ultimate charitable purpose' does not denote that a family *Waqf* is not in itself charitable in Islamic law. Rather, it is a mechanism by which the perpetuity of the *Waqf* is insured. Antony Duckworth affirms, '[o]ne might be tempted to think that the charitable element in a waqf ahli is merely technical . . . But in Islam charity begins at home, and a family endowment is regarded as charitable, even if it is not limited to those who are poor'.[24] This is similar to the Cy-près doctrine under English law. That is, the ultimate charitable purpose of a *Waqf* is functionally similar to the charity that replaces the original one by means of Cy-près when the latter disappears. In this way, the Islamic family is the original 'charitable purpose'.

In brief, the 'ultimate charitable purpose' rule is a safeguard against a hypothetical eventuality in which the settlor's descendants become extinct, leaving property, which is tied up perpetually, to no one whomsoever. An 'ultimate charitable purpose' is a solution for that rare eventuality and *is not* a mere legal ruse to make lawful that which is initially not. It is not a new different purpose but an extension of the *Wāqif*'s initial intention to benefit his family, as, after all, both the ultimate charitable purpose and benefiting family is equally charitable. This distinction is important; as some of the English judgments discussed below are founded upon the assumption that the 'ultimate charitable

22 *Mujibunnissa v Abdul Rahim* (1900) 28 Ind Apps 15.

23 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* [1964] AC 12, 18. This case is discussed in detail below.

24 Anthony Duckworth, 'Philanthropy and Law: From the Banks of the Euphrates to the Beaches of Grand Cayman' (2010) 17 Journal of International Trust and Corporate Planning 133, 145.

purpose' doctrine was 'illusory' implying that it is a mere ruse to get around the requirement for a *Waqf* to be charitable.

However, as it has been illustrated that charity in Islamic law includes providing for one's family, constructing the 'ultimate charitable purpose' as a legal ruse is inconsistent. It is inconsistent as it effectively says this: *As Islamic law only allows the establishment of charitable Waqfs, and that constituting a Waqf for the benefit of one's family, despite being a charitable act in its own right, is illegal unless one attaches to it an 'ultimate charitable purpose'*. This construction is flawed as, while acknowledging that providing for one's family is charitable, it fails to explain why *only* designating one's family members as beneficiaries of the *Waqf* is not enough to validate it. In other words, it implies that creating a *Waqf* for one's family is an illegal act that needs a specific process of legitimisation or legalisation. For that, one would have to prove why, since it is considered to be charity in Islamic law, is designating one's family members as beneficiaries of a *Waqf* illegitimate, as there is no textual or logical explanation for that line of reasoning.

The crux of the requirement for an 'ultimate charitable purpose', rather, lies in the *Ḥanafī* legal *desideratum* for *all Waqf*s to be perpetual. Indeed, both acts of providing for one's family and donating to other charitable purposes are *equally* charitable in their nature. The difference, however, lies in their propensity for perpetuity. One's family or descendants are hypothetically capable of becoming extinct, while a charitable purpose, such as housing the poor for instance, has a propensity for perpetuity as such purposes will probably not cease to exist as long as the human race is in existence. Perpetuity is desirable because a *Waqf* is, in essence, a charitable construct. It has been developed as a means to ensure that a person creating it can perpetually receive rewards from God for his charity. This is what Islam calls a *Ṣadaqah Jāriyah* or a perpetual charity. In other words, to fully glean the *desideratum* of perpetuity, one must understand the eschatological underpinning of the *Waqf* mechanism; a *Waqf* is a mechanism whereby a Muslim, even after his death, can get as much reward as possible in the afterlife.

1.2 Shāfiʿī *and* Ḥanbalī *Positions on the Mandatory Perpetual Requirement*

Between the two contrasting *Ḥanafī* and *Mālikī* poles, the *Shāfiʿī* and *Ḥanbalī* schools of thought adopt a middle ground. While still holding true to the general principle that *Waqf*s must be perpetual, the *Ḥanbalī* School allows family *Waqf*s without requiring an ultimate charitable purpose.[25] *Ḥanbalī*s state that

25 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 277–292; Almirdāwī 74–95.

in the event of the family becoming extinct, the property would revert to the settlor if he were still alive, or to the poor if he were not.[26] The *Shāfiʿī* School adopts a similar position, except that on one account in that particular school, if the descendants of the *Wāqif* become extinct, the benefit of the *Waqf* transfers to the *Wāqif*'s nearest relatives and so forth, not absolutely but as new beneficiaries of the *Waqf*.[27] Similarly to the *Ḥanbalīs*, another opinion in *Shāfiʿī* law holds that upon the extinction of the *Wāqif*'s descendants, the *Waqf* is transformed to a charitable *Waqf* for the poor.[28] So, the *Shāfiʿī* and *Ḥanbalī* schools accept the possibility that a family *Waqf* may not be perpetual. Thus, they seem to tolerate instances of incidental non-perpetuity but maintain their stance against purposely-designed temporary *Waqf*s. However, only in one account in the *Ḥanbalī* School does one get close to a termination of the *Waqf* upon the cessation of its purpose, and a reversion of the *Waqf* property to the *Wāqif*.[29] Otherwise, both schools create a constructive ultimate charitable purpose to ensure perpetuity.

It is important to note that, although both the *Shāfiʿī* and *Ḥanbalī* schools are less restrictive than the *Ḥanafī* School in this particular matter, the opinion of both schools still offends the rule against perpetuities. Although not requiring an explicit ultimate charitable purpose at the outset, both schools still provide for a *Waqf* that involves interests that will, with a high degree of certainty, vest outside the perpetuity period of 125 years. The only opinion that is compatible with the rule against perpetuities is the *Mālikī* opinion, providing that the temporary *Waqf* creates interests that are certain or likely to vest within the perpetuity period, following the 'Wait and See' approach.

1.3 *Weighing Up the Various Islamic Opinions on the Mandatory Perpetual Requirement*

After citing the differences of opinion on perpetuity and favouring the majority opinion, Alkubaysī, a current authoritative Islamic jurist in *Waqf* law, concludes that a *Waqf* that is explicitly temporary will be void. The reason he uses to support his conclusion is, as it is illegal to construct a temporary *Waqf* in Islamic law, the only way to uphold a *Waqf* that the settlor declares to be temporary would be to make it perpetual. But making a temporary *Waqf* perpetual

26 Alkubaysī 424–423; Ibn Qudāmah Almaqdisī, *Almughnī*, vol 10 (Maktabat AlQāhirah 1968), 217.

27 Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 253; Alramlī 373–374.

28 Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 253; Alramlī 373–374.

29 This can be problematic in application, especially if the cessation of the *Waqf*'s purpose occurs decades or even centuries after the death of the *Wāqif*.

would force upon the settlor's will that which he did not intend, so the best remedy, in Alkubaysī's view, would be to declare the *Waqf* void and return the *Waqf* property to the settlor.[30]

This view is problematic and to question Alkubaysī, and the three schools of thought that oppose temporary *Waqf*s, one must first investigate the primary evidence upon which this opinion is based. In the primary *Ḥadīth*, upon which the legitimacy of *Waqf* law rests, after being asked about 'Umar's land in Khaybar, prophet Mohammad said, 'if you wish you can imprison its capital and designate its benefit to charity'.[31] 'Umar does so stipulating that the capital is not to be sold, gifted, inherited and that its fruit is spent on the poor, the relatives, freeing slaves, preparing soldiers for battle, guests, and the travellers who did not have means to return home.[32] Undeniably, the prophet's saying coupled with 'Umar's action may be interpreted as being suggestive of perpetuity being a necessary condition for *Waqf*s. The prophet says 'you can imprison its capital', which may potentially mean imprison for good, or, in other words, in perpetuity. However, the term 'imprison' is absolute and unqualified (*Muṭlaq*). So, while 'imprison' can potentially mean to imprison perpetually, it can also mean to imprison temporarily. In Islamic law, a *Muṭlaq* word or statement remains unqualified unless there is evidence for its qualification. Kamali explains the nature of *Muṭlaq* statements and their legal consequences in Islamic law,

> *Muṭlaq* denotes a word which is neither qualified nor limited in its application. When we say, for example, a 'book', a 'bird' or a 'man', each one is a generic noun which applies to any book, bird or man without any restriction. In its original state, the *muṭlaq* is unspecified and unqualified . . . When the *muṭlaq* is qualified by another word or words it becomes a *muqayyad*, such as qualifying 'a book' as 'a green book, or 'a bird' as 'a huge bird' or 'a man' as 'a wise man' . . . The *muṭlaq* remains absolute in its application unless there is a limitation to qualify it. Thus the Qur'ānic prohibition of marriage 'with your wives' mothers' in sūra al-Nisā' (4:23) is conveyed in absolute terms, and as such, marriage with one's mother-in-law is forbidden regardless as to whether the marriage with her

30 Alkubaysī 240–241. This is also the predominant opinion of the *Ḥanbalī* school of thought in dealing with *Waqf*s that are explicitly temporary, see Almaqdisī, *Almughnī* 192.

31 Aḥmad Ibn Ḥajar Al'asqalānī, *Fatḥ Albārī Sharḥ Ṣaḥīḥ Albukhārī* (Dār Alrīyān Lilturāth 1986), *Ḥadīth* no. 2620; Yiḥyā Alnawawī, *Sharḥ Alnawawī 'alā Muslim* (Dār Alkhīr 1996), *Ḥadīth* no. 1633 [translation my own].

32 Al'asqalānī, *Fatḥ Albārī Sharḥ Ṣaḥīḥ Albukhārī*; Alnawawī, *Sharḥ Alnawawī 'alā Muslim*.

> daughter has been consummated or not. Since there is no indication to qualify the terms of the Qur'ānic command, it is to be implemented as it is. But when a *muṭlaq* is qualified into a *muqayyad*, the latter is to be given priority over the former.[33]

Using the rules of construction relating to *Muṭlaq* and *Muqayyad*, it is apparent that '*Iḥbis*' or 'imprison' is a *Muṭlaq* term with regards to the length of imprisonment. It can mean to imprison perpetually, however, as the term is unqualified as to the length of imprisonment, it can also mean to imprison temporarily. Since no textual evidence from the Quran or *Ḥadīth* qualifies the term 'imprison', it simply cannot be qualified using reason alone, and, therefore, the term itself cannot exclude temporary imprisonment.

Resort has to be made to 'Umar's action, as it is suggestive of his understanding of the prophet's *Muṭlaq* term. It could be argued that 'Umar stipulated that his *Waqf* should not be sold and that that would tip the scales in favour of construing perpetual imprisonment in the prophet's *Ḥadīth*. However, this can be dismissed for the reason that although perpetuity and inalienability are related, they are not the same thing. Further, again, 'Umar's stipulation not to sell the *Waqf* property is also *Muṭlaq* as to the length of that inalienability; it could be perpetual or not. Based on this, the strength of the *Mālikī* opinion allowing temporary *Waqf*s can be fully appreciated, and, consequently, it deserves more merit and study, for it can bridge the perceived unbridgeable gap between Islamic *Waqf* law and English trusts law.

2 English Law's Rule against Perpetuities: Doctrine and Policy

Although the rule against perpetuities is more simplified today, in the late 1930s, Leach described it as 'a very highly elaborated field of the law'.[34] The

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33 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003), 155–156. For the details intricacies of the rules governing *Muṭlaq* and *Muqayyad* statements, see 156–158. Also, see Moḥammad Alfutūḥī, *Mukhtaṣar Altaḥrīr fī Usūl Alfiqh* (Moḥammad Ramaḍan ed, 1st edn, Dār Alarqam 2000), 164–166; Ibn Qudāmah Almaqdisī, *Rawḍat Alnāthir wa Junatu Almunāthir*, vol 2 (Sa'ad Alshathri ed, 1st edn, Dār Alḥabīb 1422 AH), Moḥammad Alghazālī, *Almustaṣfā* (Moḥammad Alshafi ed, 1st edn, Dār Alkutub Al'ilmiyah 1993), 262.

34 W. Barton Leach, 'Perpetuities in a Nutshell' (1938) 51 Harvard Law Review 638, 638. For a more colourful depiction of the rule by Leach, see W. Barton Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror' (1952) 65 Harvard Law Review 721, 725 & 727, 'The Rule persists in personifying itself to me as an elderly female clothed in the

rule against perpetuities is a 'tenet of the common law'.[35] It is crucial for trust lawyers and academics to have a firm grasp of perpetuities laws because the rule against perpetuities has been one 'of the most common causes' for invalidating trusts.[36]

The rule against perpetuities is a 'peremptory command of law', not 'a rule of construction'.[37] Leach believes that the rule against perpetuities is not a 'rule-of-thumb' but an 'expression of a policy of the law'.[38] According to Gray, 'every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied'.[39]

With regard to trusts and *Waqf*s, from a comparative perspective, understanding their different respective standpoints on perpetuities is crucial, as this issue is the most notable distinguishing factor between trusts and *Waqf*s. Perpetuities in *Waqf*s has been explained above and now the issue of perpetuities in English law will be elaborated.

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dress of a bygone period who obtrudes her personality into current affairs with bursts of indecorous energy . . . The old lady of our allegory must learn to sit by the fire and confine her activity to a few words of wise advice from time to time; she must forego this skittish activity that has caused such trouble and damage in the household'.

35 Karen J. Sneddon, 'The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts' (2002) 76 Tulane Law Review 189, 192.

36 Jill E. Martin, *Hanbury & Martin: Modern Equity* (19th edn, Sweet & Maxwell 2012), 379.

37 John Chipman Gray, *The Rule Against Perpetuities* (ULAN press 2012), 378. I am aware of the dangers of citing Gray, as his book is out-dated in many areas. See W. Barton Leach, 'Perpetuities: The Nutshell Revisited' (1965) 78 Harvard Law Review 973, 973–974, 'Gray was a great man whom I never had the privilege of knowing, and his book was a great book—in 1886. But great men and their great books create problems. They tend to freeze things in antique patterns . . . Gray's volume dominate professional thinking for sixty years after the first edition was published. But matters are different now, and a good thing it is, too. In the last twenty years the literature on the Rule has burgeoned, with fewer and fewer references to Gray'. Lynn notes, 'Gray's classic formulation of the Rule came at a time when property law made up much of lawyer's learning. That day is over . . . Although the Rule is far from perfect in conception and application, it is doubtful that it exists today in Gray's classic form'. See Robert J. Lynn, 'Reforming the Common Law Rule against Perpetuities' (1961) 28 The University of Chicago Law Review 488, 492 & 502. Therefore, I have only cited Gray on matters, which, to the best of my knowledge and judgment are still pertinent today.

38 Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror', 746.

39 Gray 378. See *Dungannon v Smith* (1846) 8 ER 1523.

2.1 *Definition of Perpetuity and the Rule against Perpetuities*

Gray believes perpetuity has two meanings; a 'natural . . . original' meaning, and an 'artificial meaning'. Gray defines the first as 'an inalienable, indestructible interest', and the second is defined as 'an interest which will not vest till a remote period'.[40] According to Gray, when one speaks about the rule against perpetuities, he is referring to the second 'artificial meaning'.[41] The Ministry of Justice defines the perpetuity period as 'the length of time that the future ownership of property can be dictated by a person setting up a trust'.[42]

Under the second 'artificial' meaning, according to Gray, even charitable trusts do not really offend the rule against perpetuities. In his words,

> Now while it is true that the nature of charitable trusts makes them inalienable, and therefore perpetuities, in the natural sense of that term, it is by no means a necessary incident of charitable trusts that they should be allowed to begin in the remote future; or, in other words, that they should be exempt from the operation of the Rule against Perpetuities. The law may have exempted them, but such exemption is not involved in the conception of charity.[43]

The true formulation of the rule against perpetuities, according to Gray is, 'no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest'.[44] However, Leach does not believe that the 'whole law of perpetuities' can be 'put in a single sentence', and that 'Gray's formulation would be more realistic if it were preceded by the words *Generally speaking* and if the word *vest* were put in quotation marks'.[45]

Further, Moffat et al. assert that the term rule against perpetuities is a 'misdescription on two grounds'.[46] First, the rule is not about outright banning perpetuity, it is about permitting it within limits.[47] Second, the rule is not

40 Gray 91.

41 Ibid.

42 'Press Release: Law Reformed on leaving property in trust for future generations' *Ministry of Justice* (7 January 2010).

43 Gray 361–363.

44 Ibid. 144.

45 Leach, 'Perpetuities in a Nutshell', 639.

46 Graham Moffat, Gerry Bean and Rebecca Probert, *Trusts Law* (5th edn, Cambridge University Press 2009), 318.

47 Ibid.

concerned with the duration of interests; rather, it is concerned with their commencement, 'the rule strikes at the remote vesting of property interests'.[48]

Leach states that although they stem 'from the general policy against withdrawal of property from commerce', the 'Rule against Perpetuities must be distinguished from the rule against restraints on alienation'.[49] Gray adds, '[a]n interest is not obnoxious to the Rule against Perpetuities if it begins within lives in being and twenty-one years, although it may end beyond them'.[50] According to Leach, 'a trust for A for life, and then for A's children for their lives and then for Harvard College is perfectly good'.[51] This is similar to a family *Waqf* and suggests that the common law could potentially accommodate a family *Waqf* if the property would then be applied to a charitable purpose before the end of the perpetuity period.

2.2 *The Three Branches of the Rule against Perpetuities*

The rule against perpetuities has three 'branches': 'the rule against remoteness of vesting', 'the rule against inalienability', and 'the rule against accumulation of income'.[52]

The rule against remoteness of vesting provides 'that all interests conferred by the trust must "vest" within "the perpetuity period"'.[53] As this rule and, in particular, the perpetuity period has changed over the years; three different rules could apply depending on 'whether the trust came into effect before 1964, between 1964 and 2010, or today'.[54] The common law perpetuity period is a life in being plus 21 years.[55] S.1(1) of the Perpetuities and Accumulations Act 1964 set the perpetuity period at 80 years.[56] As the 1964 Act only applies prospectively, the common law governs all pre-1964 settlements.[57] Other than the

48 Ibid.; J.G. Riddall, *The Law of Trusts* (6th edn, Oxford University Press 2002), 59; A.J. Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), 257; J.H.C. Morris and W. Barton Leach, *The Rule Against Perpetuities* (Stevens & Sons 1962), 1–2.

49 Leach, 'Perpetuities in a Nutshell', 640.

50 Gray 164; Leach, 'Perpetuities in a Nutshell', 639.

51 Leach, 'Perpetuities in a Nutshell', 668.

52 Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, Oxford University Press 2011), 45; Gary Watt, *Todd & Watt's Cases & Materials on Equity and Trusts* (8th edn, Oxford University Press 2011), 172 & 175.

53 Gardner 46.

54 Ibid.; Gary Watt, *Trusts and Equity* (4th edn, Oxford University Press 2010), 192.

55 *Cadell v Palmer* (1833) 6 ER 956; *Re Wilmer's Trusts* [1903] 2 Ch 411. See Oakley 255.

56 Perpetuities and Accumulations Act 1964.

57 Watt, *Todd & Watt's Cases & Materials on Equity and Trusts*, 172–173.

exception in s.12, which will be explained below, the 2009 Act only applies to trusts created on or after 6 April 2010.[58]

S.5(1) of the Perpetuities and Accumulations Act 2009 states, '[t]he perpetuity period is 125 years (and no other period)'.[59] Even if an instrument makes reference to a different perpetuity period, that period would be 'ineffective'.[60] The only retrospective section of the 2009 Act is s.12, which allows trustees to ' "opt in" [by deed] to a perpetuity period of 100 years if it would be difficult or not reasonably practicable to ascertain whether the lives in being had ended'.[61] In brief, the common law period is applied to pre-1964 settlements, 80 years is applied to post-1964 but pre-2010 settlements, and 125 years is applied to all settlements created on or after 6 April 2010.

The Act also maintains the application of the 'wait and see' doctrine: s.7(1) provides, 'until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period the estate or interest must be treated as if it were not subject to the rule against perpetuities'.[62] This is important, as before the 'wait and see' doctrine, 'an excess zeal' on the part of judges meant that they strove 'to find some possibility, no matter how remote' whereby interests might not vest.[63]

The second branch of the rule against perpetuities, the rule against inalienability is unaffected by the 2009 Act. Moffat et al. explain, '[i]f the capital fund must be kept intact (i.e. inalienable) so that the income produced can be used for specific purposes for longer than the perpetuity period, the trust will be void irrespective of the applicability of the beneficiary principle'.[64] In the words of Paul Matthews, '*a non-charitable trust is void unless from the outset it is certain that the rule in* Saunders v. Vautier *must be capable of being applied to*

58 Ibid. 174.

59 S.5(1) Perpetuities and Accumulations Act 2009.

60 Ibid., s.5(2). Also see, Francesca Quint, 'The Perpetuities and Accumulations Bill: Clarity or Confusion?' (2009) 4 Private Client Business 126, 128, '[t]here is no particular magic in the number 125, but the standard use of that length of time for a modern building lease illustrates that it is generally accepted as being a substantial period, and it is noteworthy that 125 years is significantly longer than even a generous modern lifespan of (say) 90 years plus 21 years'.

61 S.12 Perpetuities and Accumulations Act 2009; Martin 381–382.

62 Perpetuities and Accumulations Act 2009, s.5(2). The 'wait and see' rule was first introduced in the 1964 Act. See s.3(1) Perpetuities and Accumulations Act 1964.

63 Oakley 255. For examples of such cases see, *Re Wood* [1894] 2 Ch 310; *Re Dawson* [1888] 39 Ch 155.

64 Moffat, Bean and Probert 319; Gardner 47; Martin 382; Sarah Wilson, *Todd & Wilson's Textbook on Trusts* (10th edn, Oxford University Press 2011), 85; Riddall 59.

it by the end of the perpetuity period'.[65] However, charities are exempt from the rule against perpetuities.[66] Accordingly, charitable trusts may be inalienable.[67] Despite their being different in operation, Gardner asserts that 'the two … surviving branches of the rule against perpetuities address two variants of the same phenomenon, the prolonged subjection of property to a trust regime'.[68] In other words, they aim at minimising 'dead-hand control'.

Established in *Thelluson v Woodford*, the third branch of the rule against perpetuities is the rule against accumulations.[69] The rule against accumulations prohibits adding the trust capital's accruing income to the trust capital beyond the perpetuity period.[70] The 2009 Act has abolished the rule against accumulations; therefore, it does not apply to trusts created on or after 6 April 2010.[71]

2.3 *Brief History of the Development of the Rule against Perpetuities*

Gray maintains that that the issue of 'remoteness in the creation of estates and interests' did not come before courts prior to the Statute of Uses (1535) and the Statute of Wills (1540).[72] There was no need for restrictions on 'the creation of future interests' as '[i]ncorporeal hereditaments' were rarely

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65 Paul Matthews, 'The New Trust: Obligations Without Rights' in A.J. Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press 1996), 11, quoted by Watt, *Trusts and Equity*, 192.

66 S.2(2) & (3) Perpetuities and Accumulations Act 2009. See also, Moffat, Bean and Probert 940–943; Gardner 108.

67 Oakley 269–270.

68 Gardner 47–48.

69 *Thelluson v Woodford* (1817) 34 ER 864.

70 Sneddon 199.

71 S.13 & 14 Perpetuities and Accumulations Act 2009.

72 Gray 79. This issue was considered before these two statutes, see Herbert Barry, 'The Duke of Norfolk's Case' (1937) 23 Virginia Law Review 538, 539–540, 'Perpetuities, as they came to be called, originated in an Act of Parliament, the statute *De Conis Conditionalibus*, passed in the 13th year of Edward I, A.D. 1285. This provided in effect that estates tail might be created in such form that the entail could not be broken or the rights of the successive owners impaired; it was highly favored by those of the peerage who had large estate and wished to preserve them indefinitely in the family secure from forfeiture for treason or felony, also from creditors or improvident disposition. In other circles "perpetuities" were the subject of much criticism. Repeated efforts to secure a repealing statute were unsuccessful, and the system flourished for nearly 200 years, until Edward IV became irked by the restriction on royal privilege, and thereupon the judges in *Taltarum's* case ended it by judicial legislation'.

created to commence '*in futuro*'.[73] In 1682, the '*Duke of Norfolk's Case*[74] marks the close of the first stage in the history of the rule against perpetuities' and '[i]t was now a settled point that a future interest might be limited to commence on any contingency which must occur within lives in being'.[75] Gray asserts that the rule has no feudal origins and that it is a result of 'the practical needs of modern times'.[76]

Yet, according to Watt, the rule against perpetuities is not entirely driven by economic reasons; initially, the Rule also had religious roots in the belief 'that perpetual gifts trench on God's prerogative to provide future well-being'.[77] Watt uses the case of *Pells v Browne* to demonstrate this. In *Pells v Browne*, Dodridge J. states, 'because God gives land to the children of men, if men were able to keep land in their families forever it would deny the Providence of God'.[78] This can be contrasted with the Islamic position on *Waqf*s. Those Islamic jurists who advocate the perpetuity of *Waqf*s, and they are the majority, do so in the belief that once property is settled, its ownership is transferred to God and could never again be retrieved. The idea that perpetual settlements deny the 'Providence of God' is never considered in Islamic literature on *Waqf*s. Rather, perpetual *Waqf*s are seen to please God, as they are a means of maintaining good deeds after death and a perpetual source of reward for their creators. Prophet Mohamed is reported to have said, 'when a person dies, his good deeds end except for three things: a perpetual charity, knowledge that is beneficial to those who receive it, and a pious son that prays for him'.[79]

An important recent landmark in English law was the 1998 Law Commission report on the Rule against Perpetuities, which led to the 2009 Act. In their report, the Law Commission accepted that the 'rule is a restriction on an owner's freedom to dispose of property as he or she wishes'.[80] Although its desirability has not been proven economically, the Law Commission held that 'dead hand control' continues to be the main reason behind the Rule against Perpetuities.[81] The Law Commission accepts 'that the only justification for it [the Rule against Perpetuities] is the need to place some limit on how far one

73 Gray 87.

74 *The Duke of Norfolk's Case* (1682) 22 ER 931.

75 Gray 115.

76 Ibid. 144. For more on the Rule's initial history, see Morris and Leach 3–13.

77 Watt, *Trusts and Equity*, 186.

78 *Pells v Browne* (1620) Cro Jac 590, 221, [quoted and translated by Watt, *Trusts and Equity* 186, fn 74].

79 Alnawawī, *Sharḥ Alnawawī 'alā Muslim, Ḥadīth* no. 1631 [translation my own].

80 *The Law Commission Report No 251* (1998), 7.20.

81 Ibid. 1.9.

generation can control the devolution of property for the future, and that it should not apply where that justification is absent'.[82] Hence, although considering abolishing the rule against perpetuities, the Law Commission recommended creating a fixed perpetuity period of 125 years, which was later made into law by the 2009 Act.

2.4 *The Policy Considerations Behind the Rule against Perpetuities*

Arthur Hobhouse, a nineteenth century Privy Council judge, wrote about dead-hand control being a driving force for the rule against perpetuities.[83] His argument against 'founder-worship'[84] can be summed up in the following quotation,

> To me it seems the most extravagant of propositions to say that, because a man has been fortunate enough to enjoy a large share of this world's goods in this life, he shall therefore and for no other cause, when he must quit this life and can enjoy his goods no longer, be entitled to speak from his grave *for ever* and dictate *for ever* to living men how that portion of the earth's produce shall be sent.[85]

Hobhouse asserts that 'living' possessors of property do not have a 'natural right' to 'exercise eternal dominion over it'.[86] More importantly, Hobhouse argues that while a living man has a conscience and awareness of current affairs, the dead man does not, and therefore he cannot be 'guided by any considerations of public spirit or benevolence'.[87] Simpson elaborates, 'given that one can, to a limited extent only, foresee the future and the problems it will generate, landowners should not be allowed to tie up lands for periods outside the range of reasonable foresight'.[88] Hobhouse seems to be against even limited perpetuity, '[w]hat could be more irrational than to maintain that each generation shall be considered more competent to foresee the needs of the

82 Ibid. 7.20.

83 Interestingly, Arthur Hobhouse is also the leading judge in the *Abul Fata* case, which will be discussed in detail below.

84 Arthur Hobhouse, *The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property* (Chatto & Windus 1880), 118.

85 Ibid. 9 & 47–48.

86 Ibid. 12 & 14.

87 Ibid. 94 & 105.

88 A.W.B. Simpson, *Legal Theory and Legal History* (Continuum International Publishing Group 1987), 159–160.

coming one, that that one, when arrived, is to see them?'[89] The ailments that the rule against perpetuities seeks to rectify are still present by allowing any type of perpetuity. Initially, this was the position of some of the judges in the *Duke of Norfolk case*. Barry states,

> In their view under no circumstances could such a remainder after an entail be effective "because the limitation to one and the heirs male of his body is a full disposition of the term. And if such limitations over were permitted, it would create perpetuities which the law doth abhor." This abhorrence made the gift of any such remainder anathema no matter how soon the remainder must in fact become effective if at all. The law as so laid down was inflexible, even if in application to specific facts it was illogical.[90]

Gardner notes, 'for the duration of the perpetuity period, the law will accept the degree of damage to social well-being that trusts can entail; but then it draws the line'.[91] So, even if limited perpetuity damages 'social well-being', such damage is outweighed by the benefit such limited perpetuity yields to beneficiaries.

Hobhouse also goes as far as rejecting the utility of perpetual public purpose trusts; he daringly states, '[w]e should be able to point to institutions and arrangements of great acknowledged value taking their origin in some bequest, and which, but for that bequest, could never have flourished?'.[92] The obvious answer to Hobhouse's dare is Merton College, Oxford, which is a college that was set up as a result of an endowment and still flourishes today.[93] It is clear that Hobhouse would go to extreme lengths in his fight against perpetuity, even accepting that his proposals could lead to people being much less charitable with their wealth. He states, '[i]f people will not give freely and generously; if they will not really give; if they insist on only pretending to give, while all the while they are stipulating to remain owners themselves, then, say I, "Let their money perish with them!" '.[94]

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89 Hobhouse 113.

90 Barry 553.

91 Gardner 47–48.

92 Hobhouse 94–95.

93 See Monica Gaudiosi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College' (1988) 136 University of Pennsylvania Law Review 1231.

94 Hobhouse 123.

Nevertheless, sometimes to fully appreciate an argument, one must take it to its extreme logical end. If every owner of property today were to perpetually settle their properties, how would society cope with such a great removal of assets from the market? Given the finite resources and infinite needs of society, such a drastic circumstance would be catastrophic. Yet, in reality, we do not live in such extremes, so the catastrophic events associated with such extremes are almost certain not to occur. In any event, Justice Byrne states, 'the principle was that restraints on trade are contrary to public policy and that is the principle still'.[95] Simes notes that the 'policy in favor of alienability is taken to be axiomatic'.[96] Simes explains, '[i]t is nothing less than free marketability versus restrictions imposed by an erratic testator, not free enterprise versus governmental regulation'.[97] Hudson believes that the rule against perpetuities protects free markets, not property rights. He states,

> This economically vibrant view marks a seismically important shift in the attitudes of the English courts away from the protection of private property rights (for example, enabling the property owner to deal with their own property how they wished) and towards the protection of free markets in which capital is *required* to circulate from person to person.[98]

At the heart of the issue is a struggle between the competing policies of individualism and egalitarianism. Gallanis asserts,

> . . . there is an inevitable clash between two of the great philosophical traditions in English law: liberalism, which declares that it is just for property owners to have the freedom to do what they wish with the property they own (including the freedom to impose restraints on their successors), and egalitarianism, which proclaims that all owners, present and future, should enjoy precisely the same rights and that one owner should not be able to bind another.[99]

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95 *Re Hollis' Hospital* (1899) 2 Ch 540, 553. See generally, *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1864] AC 535; *Colgate v Bacheler* Cro Eliz 872; *Mitchel v Reynolds* 1 P Wms 181; *Homer v Ashford* 3 Bing.

96 Lewis M. Simes, 'The Policy against Perpetuities' (1955) 103 University of Pennsylvania Law Review 707, 708.

97 Ibid. 711.

98 Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge—Cavendish 2008), 49.

99 T.P. Gallanis, 'The Rule Against Perpetuities and The Law Commission's Flawed Philosophy' (2000) 59 Cambridge Law Journal 284, 286–287.

Gallanis says that the egalitariansim 'argument makes a descriptive claim and a normative claim but cannot substantiate either of these'.[100] As for the descriptive claim, Gallanis states,

> Implicit in this argument is the assumption that owning property outright is always, or almost always, more satisfying than receiving property subject to restrictions. In some cases, the assumption is warranted, but why should it necessarily be so? The infirm, children under the age of majority, and people not good with money may well prefer receiving property in trust rather than outright. If the Rule is to be justified by utilitarian arithmetic, the calculation should recognize that at least some trust beneficiaries prefer having money managed by a third party.[101]

As for the normative claim, Gallanis affirms,

> There is no reason why this normative claim [that property ought not to be held up] must be true. First, it should be noted that both Professor Simes and the Law Commission have misunderstood the nature of the utilitarian calculation. The calculation should not be limited to the satisfaction of present and future property owners. Rather, it should be broadened to include the satisfaction of present and future members of society, whether or not they own property . . . the normative argument fails to explain, and indeed cannot explain, its assertion that maximising satisfaction necessarily produces the most just result.[102]

For Gallanis, the economic argument is 'key to the Rule's defense' as the 'Rule cannot be supported by abstract concepts, such as liberty, equality, or property rights, because the Rule embodies a compromise among these abstractions'.[103]

Moffat et al. argue that the rule against perpetuities achieves 'a satisfactory practical compromise by balancing the competing claims of successive generations'.[104] The Law Commission also adopted this justification as a

100 Ibid. 287.

101 Ibid.

102 Ibid. 289.

103 Ibid. 292.

104 Moffat, Bean and Probert 316; Oakley 254–255; Ronald H Maudsley, *The Modern Law of Perpetuities* (Butterworths 1979), 221–222.

reason to retain the rule against perpetuities.[105] Morris and Leach elaborate this justification,

> The dilemma is thus precisely what it has been throughout the history of English law, namely, how to prevent the power of alienation from being used to its own destruction. In this idea of compromise between two competing policies—freedom of disposition by one generation and freedom of disposition by succeeding generations—the Rule against Perpetuities seems to the present authors to find its best justification.[106]

Some have also argued that allowing perpetual trusts threatens democracy. Goodwin says, '[i]f liberty allows for the accumulation of great wealth, then in a democracy the forces that operate to dissipate this wealth have long been thought salubrious so that, at least over time, citizens remain similarly subject to the vicissitudes of fortune'.[107] Though, in response, democracy is about representation. If a person who is less fortunate has an equal chance of representation to the more fortunate, then democracy is alive and well.

According to some, perpetual trusts can even be bad for the beneficiaries themselves. Madoff argues that it is not in children's best interest to be given so much wealth that they do not need to earn a living.[108] Silverman responds, '[t]rust-fund babies [are] a drawback of any trust and could be mitigated by incentive provisions (e.g. they can only receive distributions if they finish college)'.[109] Though, another problem for beneficiaries eventually would be their sheer number. Gallanis notes, 'if settlors were permitted to establish perpetual trusts for their descendants, the number of beneficiaries would grow markedly over the generations, eventually becoming too large to handle'.[110]

By contrast, some have questioned whether the rule against perpetuities has become 'a rule without a reason'.[111] In her article discussing the Manitoba's

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105 *The Law Commission Report No 251*, 1.9 & 1.17.

106 Morris and Leach 17–18.

107 Iris J. Goodwin, 'How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune' (2010) 40 Seton Hall Law Review 467, 516.

108 Ray D. Madoff, 'America Builds an Aristocracy' *The New York Times* (11 July 2011) <http://www.nytimes.com/2010/07/12/opinion/12madoff.html?_r=0 accessed: 7 May 2013>.

109 Rachel Emma Silverman, 'Building Your Own Dynasty: States Toss Out Restrictions On Creating Perpetual Trusts; Downside—Fees Last Forever, Too' *The Wall Street Journal* (15 September 2004) <http://online.wsj.com/article/0,,SB109520073708117885,00.html accessed: 8 May 2013>.

110 Gallanis 284–285; Simes 710.

111 Moffat, Bean and Probert 318.

abolition of the rule against perpetuities,[112] Deech believes that the rule's complexity is one of its greatest disadvantages that 'result in injustice'.[113] Moreover, Simes believes that the argument that perpetuities makes property unproductive no longer stands in the United States and England.[114] He explains that while a beneficiary who has an equitable estate may find it difficult to sell his estate, a modern trustee is 'empowered by the terms of any well-drawn trust

112 Ruth Deech, 'The Rule Against Perpetuities Abolished' (1984) 4 Oxford Journal of Legal Studies 454. Following Manitoba Law Reform Commission, *Report 49 The Rules against Accumulations and Perpetuities* (*1982*), which recommended the abolishment of the Rule against Perpetuities in Manitoba, Manitoba abolished the Rule in s.3 of the Perpetuities and Accumulations Act 1983, which provides, 'The rules of law against perpetuities, sometimes known as the rule in Whitby and Mitchell and the modern rule against perpetuities, are no longer the law of Manitoba'. The Report gave the following rationale for abolition on pp. 51–52, 'we do not consider that the conditions in this province, either today or in the likely future, constitute the circumstances which call for a perpetuity rule. The original reasons for the rule in England have never applied in this province, and we think that the number of resident or non-resident investors in the wealth of the province who will wish to create dynastic trusts is likely to remain so small, if they in fact exist, that there is not a social or economic problem. In any event, we are persuaded by the significance of the argument that the rule against perpetuities does not bring about the alienability of property; we think this is the attribute that most people incorrectly associate with the rule, and that alienability is the concern that most people would entertain about property. The rule against perpetuities does not prevent hoarding of land; it is the fact that trustees have the power to change investments, and to apply to the court under section 60 of "The Trustee Act" for a power of investment (if it is lacking), that meets this problem. So far as the balancing of the interests of the 'dead' and the 'living' is concerned, which is the current reason for the rule accepted by almost all, we have failed to see how that argument retrains force once the courts are given the power to consent on behalf of the incapacitated, the unascertained, and the unborn to the variation or revocation of trusts. The idea that the rule balances those interests was persuasive in those days when legal successive estates were as common as their equitable counterparts—those were the days of the land settlements—and there was no way in which either strict settlements or trusts could be terminated by the living. There was, of course, the rule in *Saunders v. Vautier* by which trusts can be terminated'. At present, The Law Reform Commission of Nova Scotia have also recommended the abolition of the Rule against Perpetuities for similar reasons to those mentioned in the Manitoba report, see *The Law Reform Commission of Nova Scotia: The Rule Against Perpetuities* (2010), 6.

113 Deech 456. This is especially true for North American jurisdictions, 'The rule was regarded as having developed to suit the complex large family settlements of England, unknown in Canada', p. 456.

114 Simes 712.

instrument to sell and reinvest in productive property'.[115] If no power is mentioned in the trust instrument, a trustee will sometimes be empowered by law to deal with the trust property.[116] Simes asserts, 'in England, when property is affected with a future interest, there is, in nearly all cases, some person who can sell absolutely and in fee simple'.[117] Therefore, according to Simes, if securing productivity is the only reason behind keeping the rule against perpetuities, 'the Rule should be completely abolished'.[118]

However, the trustee's powers to alienate do not present the whole picture. The trust property is burdened by fragmented ownership and this makes it less marketable and more difficult to sell. According to Matthews, '[w]hen ownership is split up between different persons, it becomes in practice inalienable, or at any rate harder to deal with. Market liquidity suffers, as do the land itself and the creditors of its owner'.[119]

Another argument for the rule is that it 'is designed to prevent an undue concentration of wealth in the hands of a few . . . [and] it is socially undesirable for some members of society to have assured incomes and be protected from the economic struggle for existence . . . the principle of survival of the fittest should apply'.[120] Simes responds,

> Modern society, with its elaborate welfare machinery, is not organized on a theory of survival of the fittest, but of survival of the weak. Moreover, if human experience means anything, we may well conclude that the progeny of weaklings are likely to be more numerous in a state of poverty than in a state of wealth.[121]

The danger is that by applying the rule against perpetuities, the law is not curbing the power of the rich, but rather punishing the unfortunate beneficiaries.[122] Further, in the U.S., Dukeminier and Krier believe that, 'unlike the rich in Britain',[123] inheriting wealth has not impaired the American

115 Ibid. 713.
116 S.57 Trustee Act 1925 c.19.
117 Simes 716–717.
118 Ibid. 721.
119 Paul Matthews, 'The Comparative Importance of the Rule in Saunders v. Vautier', 276.
120 Simes 722.
121 Ibid. 722–723.
122 Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror', 723.
123 Jesse Dukeminier and James E. Krier, 'The Rise of the Perpetual Trust' (2002) 50 UCLA Law Review 1303, 1326.

work ethic, which is coupled with the fact that that rich 'share their wealth with the less fortunate'.[124]

It is also important to bear in mind that perpetual or dynastic trusts maintain a family identity or ethos, this in itself may be something that beneficiaries are prepared to accept in return for inalienability, as 'each generation becomes quite self-consciously identified with its wealth, cognizant of its privilege'.[125] Further, perpetual trusts are a good vehicle in which to preserve 'sacred family assets', such as holiday homes, for the enjoyment of 'subsequent generations'.[126] Admittedly, though, it may become economically inefficient to hold on to such property. So, in the case of a perpetual trust where the interests never vest, where an argument could be made that the dead hand restricts the living generation, it does so, so that subsequent generations can have that similar enjoyment with the exact same limitation.

In addition, Sitkoff and Shanzenbach note, 'much of the existing literature focuses on the evils of perpetual dead hand control without discounting those evils in view of their likelihood'.[127] Dobris also believes that society no longer cares about the evils of dead-hand control, '[w]e do not seem to care much about the idea that it is good for property to be owned outright at least once every 100 years, just as it is good to reboot your computer every so often'.[128] He also adds, 'Perpetuities, in the abstract, frighten only a few law professors, a few left-of-centrists, and the law students who must learn the Rule'.[129]

Further, not all legal thinkers are in congruence as to the evil of the 'dead hand'. Stephen Munzer, for instance, finds it 'problematic to reduce the satisfaction of a given generation in order to enhance that of future generations'.[130] Gregory Alexander believes that the intergenerational-balance argument is 'either tautological or so vague as to be meaningless'.[131] Income alone is not a sole determinant of equal opportunity, 'human capital', 'knowledge', and

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124 Ibid. 1325.

125 Goodwin 470.

126 John Turrettini, 'Providing For The Year 3000' *Forbes* (6 November 2001) <http://www.forbes.com/forbes/2001/0611/220.html accessed: 8 May 2013>.

127 Robert H. Sitkoff and Max M. Schanzenbach, 'Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes' (2005) 115 Yale Law Journal 356, 413.

128 Joel C. Dobris, 'The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay' (2000) 35 Real Property, Probate and Trust Journal 601, 631.

129 Ibid. 640.

130 Stephen R. Munzer, *A Theory of Property* (Cambridge University Press 1990), 220.

131 Gregory S. Alexander, 'The Dead Hand and the Law of Trusts in the Nineteenth Century' (1985) 37 Stanford Law Review 1189, 1257, quoted by Dukeminier and Krier 1323.

'education' are other equally important determinants.[132] Posner states, '[t]he inheritance of a large amount of money may seem to confer an unfair advantage, but why more unfair than inheriting brains and energy?'.[133]

From a practical perspective, if the aim was to dismantle family dynasties, or inhibit their creation, then the rule against perpetuities has not done the job anyway; dynastic families in the U.S. and England have maintained their wealth and power for centuries, in spite of the rule against perpetuities.[134] According to Dukeminier and Krier, only various forms of taxation could curb family dynasties.[135] Additionally, we live side-by-side to many perpetual arrangements that do not bother our economies, or us, Dobris explains,

> We coexist happily, at some mythic waterhole, with perpetual nonprofit foundations, charities, college endowments, and pension trusts. Try to imagine complaining successfully that the Red Cross or the Salvation Army is a noxious perpetuity, or that the traditional pension trust is a tool from the devil's workshop. We accept long-term intellectual property rights; for example, we are prepared to consider giving the Walt Disney Company very long-term rights to exploit Mickey Mouse. As Professor Michael Froomkin likes to joke, "Copyright exists for a period of Mickey's life plus five years." . . . We accept political family "perpetuities" without blinking. We embrace term limits to cut off political careers, but we embrace political family dynasties. Nevertheless, dynasties appear hard to preserve.[136]

Leach holds that the reform of the perpetuities laws 'is a job for the repair shop, not the scrap yard'.[137] Lynn cautions, '[f]or every case serving as a reminder that the Rule needs improvement there are many showing that it works fairly well when handled intelligently by counsel and court'.[138] After assessing the weaknesses of the arguments for the rule against perpetuities, Simes does find justification for the rule in the 'dead hand' argument. Simes notes, 'we must

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132 Walter J. Blum and Harry Kalven, 'The Uneasy Case for Progressive Taxation' (1952) 19 University of Chicago Law Review 417, 504, quoted by Dukeminier and Krier 1324.

133 Richard A. Posner, *Economic Analysis of Law* (5th edn, Aspen Law & Business 1998), 553, quoted by Dukeminier and Krier 1324.

134 Dukeminier and Krier 1327.

135 Ibid.

136 Dobris 607–608 & 610.

137 Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror', 748–749.

138 Lynn 501.

strike a fair balance between unrestricted testamentary disposition of property by the present generation and unrestricted disposition by future generations'.[139] Simes then adds, 'a second and even more important reason for the Rule is this: it is socially desirable that the wealth of the world can be controlled by its living members and not by the dead'.[140] Although she accepts its rationale, Deech does not believe that the 'dead hand' argument is sufficient to retain the rule against perpetuities. She states,

> Acceptance of the rationale points rather to a need for a form of control of freedom of donation and testation which is directed against capriciousness or unreasonableness of purpose, as currently judged, instead of against length or delay . . . Granted that the settlor ought not to be allowed to exert his power over generations to come, the method of control should be related to the public good as well as that of private individuals, that is, it should be expressed in general tax and trust law as in, for example, specific laws relating to charities, bankruptcy and inheritance.[141]

In light of these policy tensions, not all common law jurisdictions are in harmony as to their positions regarding perpetuity laws. As will be seen below, many U.S. and some Canadian jurisdictions have abolished the rule against perpetuities. The Law Commission in England even briefly considered abolishing the rule against perpetuities. While the rule against perpetuities in England and Wales has been refined over the years and is now much clearer, the policy reasons behind the Rule are increasingly being challenged, especially in light of the shift in perspective in many North American common law jurisdictions.

After understanding the respective positions of Islamic law and English law on perpetuities, the scene is now set to examine instances where these two legal systems interacted on this very issue. No example is better than the late nineteenth and twentieth century colonial cases in which English judges presided over Islamic law jurisdictions and, for the first time, adjudicated on Islamic *Waqf*s and their perpetual nature.

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139 Simes 723.

140 Ibid.; David Hayton, *The Law of Trusts* (4th edn, Sweet & Maxwell 2003), 104, in which he states, 'It has long been English policy to prevent a settlor creating a trust fund for persons or for purposes that will enable the settlor to rule the living from the grave'.

141 Deech 457–458.

3 British Colonial Legal Treatment of Family *Waqf*s in Light of the Conflicting Mainstream Stances on Regulating Perpetuity

Initially, in colonial times, and in instances when legal clashes were becoming evident, common law judges have not taken up battle with Islamic legal doctrines. Driven by the idea that Muslims should be governed by their own laws, and that Muslims were the best judges of what their laws entail, judges were content to apply Islamic law as it was. In *Ibrahim Mulla*, Jackson J. states, 'We are not at liberty to substitute, for the express rules of Muhammadan Law, as expounded by the best authorities, that which, according to our opinion, might be a more enlightened and proper rule of law'.[142]

In the field of family *Waqf*s, there were several early cases in which common law courts upheld such *Waqf*s.[143] In *Bikani Mia*, Ameer J. acknowledged that there was an absolute consensus of opinion regarding the validity of a family *Waqf*.[144] Additionally, Ameer J. believed that the interference with a family *Waqf* 'is a direct interference with Mussulman religion'.[145] Nevertheless, even in cases that upheld family *Waqf*s, not all English judges were in congruence as to their validity. For instance, in *Khoja Hossein Ali v Shahzadee Hazara Begum*, an early case that allowed family *Waqf*s, Markby J. dissented: he asserted that 'absolute inalienability' of a *Waqf* should not be allowed 'merely because it contains a vague and merely nominal appropriation to charitable purposes'.[146] The majority allowed the family *Waqf* to stand. This developing debate only concerned family *Waqf*s and was not one that related to *Waqf*s in general. This was because, as charitable trusts in English law are exempt from the rule against perpetuities, they are similar to mere charitable *Waqf*s in that respect. In brief, charitable *Waqf*s could not be attacked for being

142 *Ibrahim Mulla* (1869) 12 WR 460.

143 See *Mahomed Ahsanulla* (1889) 17 Cal 498. Also see *Mujibunnissa v Abdul Rahim*; *Muzhurool Huq v Puhraj Ditarey Mohupattur* (1870) 13 WR 225 in which Kemp J said, 'the mere charge upon the profits of the estate of certain items which must in *course of time necessarily* cease, *being confined to one family*, does not render the endowment invalid'; *Fatma Bibi v Advocate General of Bombay* (1881) ILR 6 Bom 42 which also states, in *obiter*, that even if the private trusts to the family members were invalidated, the public purpose trust should be upheld; and *Amrutlal Kalidas v Shaik Hussein* (1887) ILR 11 Bom 492, although noting that this decision was against public policy.

144 *Bikani Mia v Shuk Lal Poddar*, 145.

145 Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 473.

146 *Khoja Hossein Ali v Shahzadee Hazara Begum* (1869) WR 244.

perpetual because English law had an exception for charitable trusts; therefore, the validity of charitable *Waqf*s was not contested in colonial courts.[147] Sir Roland Wilson explains,

> [I]t was impossible to doubt that *wakf* generally must be recognised by the Courts as a transaction governed as between Muhammadans by Muhammadan Law . . . but trouble arose when case after case raised the question whether the term *wakf* was also meant to cover dispositions in the nature of entail or private settlement.[148]

This illustrates that the reluctance English judges had with regard to upholding family *Waqf*s was not an attack on *Waqf* as a concept, or even on perpetuity. Rather, it was an attack on perpetuity being used for 'private' settlements. Tying up 'private' property in perpetuity for private purposes directly opposed English law's policy consideration of egalitarianism and this is why, as will be seen below, colonial courts treated family *Waqf*s so unfavourably. The cases will illustrate the fundamental tension that exists between the laws of trust and the laws of *Waqf*. This, in turn, will give us a better understanding of how the English legal system reacts when foreign norms, which fundamentally clash with English law's policy considerations, are being applied within the English legal framework. Understanding this reaction will help in formulating reform and reconciliation propositions that are more practical and workable in the future.

3.1 Abul Fata v Rosamaya (Ishak v Chowdhry)[149]

The two defendants in this case were brothers who created a *Waqf* instrumented in a deed that was dated 21 December 1868.[150] The *Waqf* was in respect of 'all their immovable property' for the benefit of their descendants and relatives, lineal or collateral.[151] The deed states that in the 'absence' of the settlor's (*Wāqif*s') family (i.e. in the event of their extinction), the *Waqf* will be

147 For the charitable trust exception from the Rule against Perpetuities, see Charles Mitchell, *Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies* (13 edn, Sweet & Maxwell 2010), 216.

148 Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 67.

149 *Abul Fata v Rosamaya* (1894) 22 IA 76.

150 Ibid. 80.

151 *Abul Fata v Rosamaya* (1891) ILR 18 Cal 399, [2].

'for the benefit of the poor and beggars and widows and orphans of *Sylhet*'.[152] The *Wāqifs* retained a substantial amount of control over the *Waqf* property appointing themselves as *Mutawalīs* of the *Waqf* stating in the *Waqf* deed that the property was in their 'possession' and under their 'control' in their 'capacity' as *Mutawalīs*.[153] They even retained English trustee-like powers such as the power to 'exchange any of the lands of this wakf with some other lands'.[154] In addition to benefiting family members and maintaining 'the prestige of the family', the *Wāqifs* were explicit that the *Waqf* was created with asset protection in mind, '[t]he object of this wakf of properties is that the properties may be protected against all risks'.[155] In 1874, the *Waqifs* 'revoked the wakf by reason of their necessities' as one of the brothers who had created the *Waqf* was heavily in debt.[156] The beneficiaries of the *Waqf* commenced proceedings against the *Wāqifs*, amongst other defendants who had retained interests in the *Waqf* property. The question before the court was whether the *Waqf* deed of 1868 created a valid *Waqf* according to 'Mahomedan law'.

Initially in 1889, following the High Court authority of *Jagatmoni Chowdhrani v Romjani Bibee* that allowed family *Waqfs*,[157] the first instance Judge of Sulhet declared that the *Waqf* was valid and he ruled that the first defendant, who was the heavily indebted brother, should be removed from the office of *Mutawalī* as a result of his breach of trust and that the second defendant, the other brother, should solely exercise that position.[158]

On appeal to the Calcutta High Court in 1891, Tottenham J. and Trevelyan J. reversed the Sulhet court's decision.[159] Trevelyan J. delivered judgment and stated that the 'purposes' of the *Waqf* were 'secular rather than religious'; though, he still affirmed that the validity of the *Waqf* was to be ascertained in accordance with 'Mahomedan law'.[160] Citing the Privy Council case of *Mahomed Ashanulla*[161] that held that a *Waqf* must, in substance, be for charitable uses, Mr. Evans for the defendants, who were the appellants, argued that a *Waqf* in this case was not valid as it had not been 'primarily' and 'sub-

152 *Abul Fata v Rosamaya* 83.
153 Ibid.
154 Ibid. 84.
155 Ibid.
156 *Abul Fata v Rosamaya* [2].
157 *Jagatmoni Chowdhrani v Romjani Bibee* ILR 10 Calc 533.
158 *Abul Fata v Rosamaya* 78.
159 *Abul Fata v Rosamaya*.
160 Ibid. [6–7].
161 *Mahomed Ahsanulla*.

stantially' for a charitable purpose.[162] The Advocate-General, acting for the plaintiffs, who were the respondents, argued that *Mahomed Ashanulla* was immaterial to the case at hand.[163] He cited two main cases that upheld family *Waqfs* that were perpetual and that had an ultimate charitable or religious purpose.[164] Trevelyan J found in favour of the appellants.[165] He reasons that the Hedaya, a *Hanafi* Islamic law treatise, states that a *Waqf* must be for a religious or charitable purpose, although temporary benefit could be reserved for *Wāqif's* family.[166] Further, although the *Waqf* in this case loosely resembles the *Waqf* sanctioned in the Hedaya, Trevelyan J distinguishes it on the basis that it depends 'upon an uncertain contingency'.[167] In other words, there is no certainty as to when the family's interest will cease, and therefore there is no certainty as to when the charitable purpose will benefit. In addition, Trevelyan J felt that this was a sham arrangement that acts as a 'veil to cover arrangements for the aggrandisement of the family and to make property inalienable'.[168] Trevelyan J, using purposive interpretation, held that 'Mahomedan law' could not have intended such a result.[169]

The case was then brought before Lords Watson, Hobhouse, Shand, and Sir Richard Couch in the Privy Council and a decision was reached and judgment was delivered by Lord Hobhouse in 1894.[170] Ameer Ali on behalf of the Plaintiffs, the appellants before the Privy Council, made a stronger argument for the validation of the *Waqf*. He argued that 'charitable purposes' in Mahomedan law carried wider scope than it does in English law, covering one's family.[171] He further 'contended that not until the Mahomedan law officers ceased in 1864 to be consulted by the Law Courts was the doctrine laid down that a wakf on the members of one's family was invalid'.[172] He also argued that invalidating family *Waqfs* would impose 'disabilities upon Mahomedans which would conflict with their religious customs'.[173] On behalf of the defendants, the respondents before the Privy Council, Doy'ne attacked the family

162 *Abul Fata v Rosamaya* [9].
163 Ibid. [10].
164 *Fatma Bibi v Advocate General of Bombay*; *Amrutlal Kalidas v Shaik Hussein*.
165 *Abul Fata v Rosamaya* [17].
166 Ibid. [15].
167 Ibid.
168 Ibid. [16].
169 Ibid. [17].
170 *Abul Fata v Rosamaya*.
171 Ibid. 80.
172 Ibid. 81.
173 Ibid.

Waqf in this case on two major points. First, he asserted that, after examination of the *Waqf* deed, 'it appeared that there was no real intention to benefit the poor'.[174] Second, he contended that after the deed had been executed, the Defendants had continued to manage the estate as they had done before executing the deed.[175]

Lord Hobhouse expressed his unease at having to adjudicate on questions of Islamic law by apportioning part of the blame to a seemingly incompetent 'Mahomedan lawyer' whose opinion was based upon 'texts of a[n] abstract character, and upon precedents very imperfectly stated'.[176] Lord Hobhouse exposed his unfamiliarity with the nature of precedent in Islamic law by stating, 'As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all'.[177] Lord Hobhouse's candid admission of his unfamiliarity with the nature of precedent in Mahomedan law reveals the difficulty judges went through in navigating this unfamiliar system. In any event, the role of precedent is entirely different in Islamic law than it is in common law.

Hallaq affirms that '[Islamic] law was to be found not in precedent, or in a doctrine of *Stare Decisis*, but rather in the juristic corpus of the school, a corpus elaborated by the author-jurist (*musannif*) and extracted for difficult and complex cases by the *mufti*'.[178] Further, Islamic law's doctrine of juristic precedent does not only differ in where its normativity lies; it also espouses a doctrine that attaches greater normative force to older juristic opinions. In other words, while common law accords greater precedential weight to the most recent judgments, Islamic law affords older juristic interpretations more esteem.[179] The non-adherence to judicial precedent is the main reason why there are no Islamic law reports in the early or mediaeval periods, as the main normative sources that judges followed were juristic treatises.[180]

In *Abul Fata*, Lord Hobhouse affirmed that 'Mahomedan law ought to govern a purely Mahomedan disposition of property', and stated, '[t]heir Lordships have endeavoured to the best of their ability to ascertain and apply

174 Ibid.

175 Ibid.

176 Ibid. 86.

177 Ibid.

178 Wael Hallaq, *Shariah: Theory, Practice, Transformations* (Cambridge University Press 2009), 178. The term *Mufti* means jurisconsult.

179 Muhammad Munir, 'Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan' (2008) 47 Islamic Studies 445, 468–469.

180 Ibid. 470. For a detailed discussion of the doctrine of precedent in Islamic law, see 'Abdul'azīz Aldughaythir, 'Ḥujiyat Alsawābiq Alqaḍā'iyah' 34 Majalat Al'adl.

the Mahomedan law, as known and administered in India'.[181] However, Lord Hobhouse claimed that Islamic law, as applied in India at the time, *was not* in accordance with the classical Islamic law as embodied by the words of the prophet Muhammed.[182] Though, notably, Lord Hobhouse's claim does not explain how he reached this conclusion. Further, it is also a surprisingly authoritative statement on Islamic law bearing in mind his admission of unfamiliarity with the operation of the Islamic legal system. This claim, irrespective of its connection to the truth, renders illegitimate the Muslims' claim that their law is normative, by expounding a polemic against the very assumption by which its normativity is justified. In short, Lord Hobhouse's assertion was that Islamic law in the Indian subcontinent was not in fact Islamic law.[183] Lord Hobhouse's next step was simply to apply English law.

When Lord Hobhouse then viewed the family *Waqf* from an English law prism, the common-law rule against perpetuities had a major influence on his judgment. He held that the fact that the family members' interest in the *Waqf* was (potentially) perpetual meant that the nature of the final contingent interest to the poor—to take effect when the settlor's family had died out—was 'illusory'. This conclusion meant, in the words of Lord Hobhouse, '[t]heir Lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family'.[184] The *Waqf* was, using common law principles, declared to be a 'sham trust' and so was broken up. Andrew De La Rosa believes that 'the decision [of *Abul Fata*] may be regarded as one of the earliest precursors of the modern doctrine of "sham" trusts'.[185]

One may argue, as Hallaq has, that the judgment in *Abul Fata* was not merely one that dismantled a perfectly legal Islamic *Waqf*, it also exemplified a 'forceful application of English law as Islamic law' by using 'the colonizers' highly

181 *Abul Fata v Rosamaya* 87.

182 Ibid.

183 See Hallaq, *Shariah: Theory, Practice, Transformations*, 471, '[The orientalist discourse] injected into the nationalist ideology the notion that family *waqf* was a development in Islamic history from after the formative period, and therefore without legitimacy, since it was based neither on Prophetic tradition nor on that of the Companions (*salaf*); the implication here being that later developments, modern ones included, were as good as any other, especially if the "modern" developments excelled earlier ones in "civilizational sophistication".'

184 *Abul Fata v Rosamaya* 89.

185 Andrew De La Rosa, 'Trust Laws in the Gulf Jurisdictions: New Frontier or Desert Mirage?' (2009) 10 Journal of International Banking and Financial Law 619.

subjective notions of "justice, equity, and good conscience" '.[186] However, one must be cautious with such assertions because of the complexity of the problem at hand. The common-law's relativist approach to adjudication means that judges will mainly reach their decisions by means of the adversarial arguments forwarded by litigants. Decisions are not based on abstract principles; they are based on the strongest argument presented. Therefore, it could also be argued that Lord Hobhouse dismantled the *Waqf* because he was compelled by the Defendants' counsel argument more so than the Plaintiff's counsel. This also underscores the role of counsel in the final judgment. Perhaps if Ameer Ali had made a stronger argument for family *Waqf*s, while explaining the nature of precedent and legal evolution in Islamic law, the Privy Council would have reached a different judgment. The scope for speculation is large, but it is certain that this case highlighted the tension that exists between Islamic law and common law. Put simply, while English law has a rule against perpetuities, Islamic law requires a contingent interest that can take effect in the event of the extinction of the *Wāqif*'s family with no specific time limit in order for a *Waqf* to be perpetual and therefore valid.

Abul Fata heralded far-reaching repercussions as it outraged Muslims in India and was therefore repealed in the Mussalman Waqf Validating Act 1913 (although it is curious that it was passed nineteen years after the decision in *Abul Fata* was handed down).[187] The Act specifically provided for the freedom of Muslims to create a family *Waqf*.[188] The Act did not validate family *Waqf*s retrospectively, it only applied to family *Waqf*s that were created after the date it was passed, as confirmed by the Privy Council in *Khajeh Solehman Quadir and another* (*Appeal No. 63 of 1921*) *v Nawab Sir Salimullah Bahadur since deceased and others* (*Fort William* (*Bengal*)).[189] However, despite being overruled, the judgment in *Abul Fata* is still relevant for our purposes. It illustrates the potentially pernicious effect of judicial activism on the application of Islamic law in common law courts.[190] It also demonstrates the difficulty of applying elements

186 Hallaq, *Shariah: Theory, Practice, Transformations*, 377.

187 Ibid.; De La Rosa; Siraj Sait and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (Zed Books 2006), 159.

188 The Mussulman Wakf Validating Act, No. VI of 1913, section 3.

189 *Khajeh Solehman Quadir and another* (*Appeal No. 63 of 1921*) *v Nawab Sir Salimullah Bahadur since deceased and anothers* (*Fort William* (*Bengal*)) [1922] UKPC 23.

190 'Judicial activism' here means a judicial ruling that sought to achieve far-reaching political and economic ramifications. Muslim colonial lands had been heavily tied up in *Waqf*s and this had made it very difficult for them to be acquired by Colonial powers. Lord Hobhouse's instrumental judgment, along with others, resulted in the creation of what was known as the *Anglo-Muhammadan* law, a fusion of Islamic and common law in an

of one legal system within another, especially when there is a tension between both legal systems. More sceptically, a post-colonialist analysis may view the decision as a step towards legal and cultural assimilation, an implicit exercise of colonial hegemony.

3.2 Bakhshuwen v Bakhshuwen[191]

Bakhshuwen was a Privy Council case heard by Lords Simonds, Normand, Oaksey and Sir Lionel Leach on appeal from Kenya. A *Wāqif* created two family *Waqfs* in 15 October 1946 and 8 May 1947.[192] The *Wāqif* himself contested the validity of the *Waqfs* while his daughters, the beneficiaries of the *Waqf*, sought to uphold them.[193] In 1948, Mr. Justice Bartley in the Supreme Court of Kenya 'pronounced against the validity' of the *Waqfs*[194] being bound by *Said bin Mohamed bin Kassim el Riemi v Wakf Commissioners for Zanzibar*.[195] The appellants (who were the daughters) then appealed to the Court of Appeal for Eastern Africa and the case was brought before Sir Barclay Nihill P, Edwards CJ. and Bourke J.[196] The learned judges held that the appellants failed to establish that *el Riemi* 'was not fully seized of the correct principles of Mohamedan law' and therefore dismissed the appeal.[197] The Privy Council conceded that the Court of Appeal's decision was undermined by virtue of 'the respondent Commissioner' not being appropriately represented meaning that 'a great deal of high authority from unimpeachable sources might not have been cited to the court'.[198] Yet, the Privy Council affirmed, 'no other conclusion could have been reached in view of the decision of the Board in the leading case of' *Abul Fata*.[199]

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attempt to make the former more homogenous with the latter. See Munir 451, 'Probably the introduction of the English doctrine of precedent into India was the most important factor in shaping the sources of law in India, Pakistan and Bangladesh, which was a more rigidifying process by the Anglo-Indian court, a system that, for many good reasons, could not evolve in Islamic law'. For a general discussion of *Waqf* and Colonialism, see Sait and Lim 159–161.

191 *Bakhshuwen v Bakhshuwen* [1952] AC 1.

192 Ibid. 2.

193 Ibid.

194 Ibid. 3.

195 *Said bin Mohamed bin Kassim el Riemi v Wakf Commissioners for Zanzibar* (1946) 13 EACA 32.

196 *Bakhshuwen v Bakhshuwen* 3.

197 Ibid. 4.

198 Ibid.

199 Ibid.

When the case reached the Privy Council, the appellants challenged the Court of Appeal's decision on three grounds. Firstly, they contended that in light of the evidence brought before the Privy Council, *Abul Fata* should be reviewed.[200] Secondly, they argued that Indian precedents should not bind East Africa.[201] Thirdly, they submitted that this case was 'distinguishable' as the parties were of the 'Shafi' sect and as, unlike the donor in *Abul Fata*, the donor in this case 'had divested himself of all beneficial interest in the property'.[202] The appellants stated that between 1907 and 1923, the courts in Kenya and Zanzibar upheld family *Waqf*s and thought themselves not to be bound by Indian decisions, even if they were decisions of the Privy Council.[203] The appellants also cited *Talibu bin Mwijaka v Executors of Siwa Haji*, with regard to family *Waqf*s, in which Hamilton J. states that while on the one hand a court must 'have regard to and be guided by the general principles of the law of Islam, on the other, whatever respect it may pay to the decisions of the Privy Council, it is not bound by those decisions'.[204] The appellants also cited *Seif bin Abdulla v Administrator General*, where Hamilton J. explains that Indian precedents were rejected on the basis that they dealt with the *Ḥanafī* sect while East Africa was predominantly *Shāfiʿī*.[205] He believed that the two schools of thought were sufficiently different and, therefore, should not be treated as the same by the Privy Council. For Hamilton J, this necessarily meant that Indian precedents should not bind East African colonies as they effectively had two different legal systems.

In *Bakhshuwen*, Lord Simonds delivered judgment on behalf of the Privy Council, beginning with Hamilton J's famous judgment disregarding the precedents of Indian cases on the basis that they pertained to a different 'sect'. Lord Simonds dismissed Hamilton J's assertion, without citing textual authority for his dismissal; he simply affirmed that 'no relevant distinction on this point [family *Waqf*s] could be made between *Shāfiʿī* and *Ḥanafī* law' as the appellants did not sufficiently illustrate the distinction.[206] But Lord Simonds' affirmation does not hold true, even by accounts of English commentaries on *Shāfiʿī* law. Sir Roland Wilson explains a fundamental difference between *Ḥanafī* and *Shāfiʿī* law:

200 *Bakhshuwen v Bakhshuwen* [1951] UKPC 27.

201 Ibid.

202 Ibid.

203 *Bakhshuwen v Bakhshuwen* 4.

204 *Talibu bin Mwijaka v Executors of Siwa Haji* [1907] 2 EALR 33.

205 *Seif bin Abdulla v Administrator General* [1915] 6 EALR 74.

206 *Bakhshuwen v Bakhshuwen* 11.

> [in *Shāfiʿī* law] [i]t is not necessary that the primary object of the foundation should be religious or charitable, in the English sense of those terms. An appropriation in favour of (for instance) the founder's descendants, generation after generation, without any ulterior object of wider scope, is perfectly valid.[207]

This is a fundamental distinction because under the *Shāfiʿī* opinion there need not be an 'illusory' contingent interest which might never vest. As *Abul Fata*'s judgment was based upon the 'illusory' nature of the ultimate beneficial purpose, the *Shāfiʿī* School's opinion seems to be a difference that should have led to both schools being treated separately if not differently. Separately because, admittedly, even though the *Shāfiʿī* School's opinion is different, it does not appear to be material enough to warrant a different treatment as, ultimately, the *Shāfiʿī* opinion still sanctions a perpetual family *Waqf*. According to English law, the problem does not lay in the ultimate charitable purpose; rather, it lays in the perpetual nature of the family *Waqf* regardless of how it is structured.

Part of the blame must also be apportioned to the appellants' counsel who did not bring such a fundamental difference to the attention of the Board. However, on close inspection of this fundamental difference, it would appear to be more fatal than useful to the appellants cause. The *Shāfiʿī* sect essentially sanctions a family *Waqf* without the ultimate charitable purpose requirement. This means that although no contingent charitable interests are created, the *Waqf* still operates in perpetuity because its interest would not vest at all. Additionally, despite the fundamental difference between the *Ḥanafī* and *Shāfiʿī* schools, the *Waqf* deed in *Bakhshuwen* does specify an ultimate charitable purpose and would therefore seem to resemble a *Ḥanafī* family *Waqf* more so than it does a *Shāfiʿī* one.[208] This highlights a weakness in the appellants' argument that might have been exposed if the appellants' argument had been more technically detailed.

As the family *Waqf* in this case was identical to one that would be constituted under the *Ḥanafī* school, and as Lord Simonds did not fully appreciate the distinction between the *Ḥanafī* and *Shāfiʿī* schools on this issue, he held that *Abul Fata*, being the leading case on family *Waqf*s, was binding in East Africa despite having been repealed by legislation in its respective jurisdiction.[209]

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207 Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 421.

208 *Bakhshuwen v Bakhshuwen* 3.

209 Ibid. 11.

In order to appear sensitive to local custom and hide another manifestation of colonial hegemony, as did Lord Hobhouse, Lord Simonds also acknowledged that Islamic law should govern Muslims. Yet, what he acknowledged in one sentence he effectively dispelled with another:

> Their Lordships do not doubt that the judge was correct in saying that the right of the parties are governed by Mohamedan law . . . But they cannot accept the theory which appears to underlie his decision, that the interpretation of Mohamedan law given by this Board in a series of cases is confined to that law as applied or administered in India.[210]

As Lord Simonds ruled that Indian precedents should be followed in East Africa, *Abul Fata* became good law in the Kenyan jurisdiction and, therefore, a Privy Council Indian precedent was applied in an East African colony. Further, as *Abul Fata* banned family *Waqf*s, the ultimate effect of Lord Simonds' judgment was to invalidate the family *Waqf* in the case at hand. The only material difference between both cases is that in *Abul Fata*, as there were no precedents on which to rely upon to invalidate family *Waqf*s, Lord Hobhouse had to use legal and policy arguments to back his judgment, while, in *Bakhshuwen*, as Lord Hobhouse had established a precedent in *Abul Fata*, all that remained for Lord Simonds to do was to declare *Abul Fata*'s precedent as binding and follow it under the doctrine of *stare decisis*, without need for further justification.

Writing much earlier than *Bakhshuwen*, Sir Roland Wilson explained how the doctrine of precedent had already distorted the application of Islamic law—particularly with regard to the topics of marriage, paternity, wills, gifts, pre-emption, and *Waqf*s—in colonial India:

> . . . the accumulation of case-law has been so great as almost to hide from the modern practitioner the original Arabic foundation. And while the aim of British judges has always been to interpret and not to legislate, the mere fact that a dispute exists respecting the interpretation of a text, or as to the best way of reconciling conflicting texts, proves that when the point has been judicially determined, a new law has in effect been made, having regard to our traditional English view of the binding force of precedent. It was also inevitable that a law thus made by a singly decision, or a current of decisions, should occasionally be out of harmony with the spirit of the ancient authorities, or with the practice and established expectations of modern Muhammadans, or with both; in such cases

210 Ibid. 14.

> the Courts were, and are, powerless to remedy the mischief. The better-instructed judge is bound by the decision of his less-instructed predecessor. Where such mishaps occur in England, or even in India respecting the interpretation of British-made law, there is the Legislature to fall back upon; but our traditional policy is opposed to legislative interpretation of native laws.[211]

Additionally, Hamilton J described the destructiveness of the doctrine of precedent, as used by common law judges, to the principles of Islamic law as seen by Islamic jurists:

> . . . the law of wakf as originally understood by the commentators and Mohamedan jurists has in India since the commencement of the latter half of last century been profoundly modified by the decisions of the Privy Council. A study of the question shows that while the Mohamedan law, uninfluenced from outside sources, permitted perpetuities and the erection of wakf for family aggrandizement solely, the influence of English judges and of the Privy Council has gradually encroached on this position until decisions given quite recently have decided that such wakfs are illegal, and it has now been clearly established that a wakf for family aggrandizement or security, the ultimate beneficiaries of which are the poor, whether mentioned by name or supplied by implication are invalid.[212]

On a final note, as a matter of principle and policy, the fact that the Privy Council in *Bakhshuwen* laboured to apply law that was legislatively repealed is one to be contested. Using his interpretive arsenal, Lord Simonds found ways to get around the express wish of Parliament. However, in the case of *Bakhshuwen*, it could be argued that, as the case stated, it was not clear whether the *Waqf* Ordinance was yet in operation, and, therefore, judges had to find what the law was in absence of the *Waqf* Ordinance.[213] In addition, even if the Ordinance had passed, the *Waqf* was clearly created much earlier and would therefore not be retrospectively validated. Yet, this was not certain; the Ordinance may have been retrospective and as it directly affected *Bakhshuwen*, Lord Simonds

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211 Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 47.

212 *Talibu bin Mwijaka v Executors of Siwa Haji* 36.

213 The Wakf Commissioners Ordinance 1951 (Wakf Commissioners Ordinance).

and his peers on the bench could have discerned whether the Ordinance was in operation, or at least they should have stated their reasons for not doing so. Moreover, in absence of the Ordinance, and in light of the fact that the *Wāqif* retained no interest in the *Waqf*, this case could have been distinguished from *Abul Fata*.

Bakhshuwen portrays the lengths to which some judges could go, using their interpretive arsenal, to set aside the application of Islamic law. Since the Privy Council was the final court of appeal for colonies, only legislative change could remedy the misunderstandings brought to bear on Islamic cases. But even where such change did occur, judicial interpretation could deprive it of any practical force. This will be demonstrated further in the court's construction of the Wakf Commissioner's Ordinance 1951 in the following case.

3.3 Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed[214]

Riziki was another later Privy Council case on appeal from East Africa involving a family *Waqf* for the benefit of adopted daughters. It was heard by Lord Evershed, Lord Morris and Mr. L.M.D. De Silva who died before judgment was delivered.[215] The case facts are as follows. In November 1942, Khadija Binti Suleman, the settlor, declared a *Waqf* over immoveable property she owned in Mombasa for the initial benefit of her two adopted daughters, Riziki Binti Abdulla and Faiza Binti Abdulla according to the terms of the *Waqf* deed.[216] The *Waqf* deed explains, in detail, that after the two adopted daughters' death, their descendants will benefit from the successive interests.[217] The *Waqf* deed goes on to explain meticulously what would happen regarding the successive interests if the two adopted daughters, or if one of them had no descendants.[218] Finally, the *Waqf* deed does provide for an ultimate charitable purpose in the event that all the designated beneficiaries die out, which is to assist 'poor Mohamedans, promoting the Mohamedan faith, educating Mohamedan children, maintaining and assisting impoverished mosques and other charitable purposes of which the Prophet would approve'.[219] After the settlor's death in 1952, her cousin administered the *Waqf* and in 1958 action was brought claiming that the *Waqf* was void *ab initio* on four main grounds.[220]

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214 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed*.

215 Ibid. 12.

216 Ibid. 14.

217 Ibid.

218 Ibid. 15.

219 Ibid.

220 Ibid.

The grounds for the claim can be summarised as follows. First, the settlor continued to be 'in possession' of the *Waqf* property in spite of her dedication.[221] Second, the two adopted daughters were not related to the settlor as adoption is not recognised under Islamic law. Third, the *Waqf* contravened s.4 of the Wakf Commissioners Ordinance 1951 as 'it was not made for the "maintenance or support of any person, or of the family, children, descendants, or kindred of the maker" of the wakf'; 'it was made to benefit adopted daughters which was contrary to "Muslim" law'; 'the gift to charity was postponed to take effect, not after the extinction of the family children . . . but after the extinction of adopted relatives and their issue; and 'the ultimate gift to charity did not purport to be for a religious, pious or charitable purpose of a permanent character'.[222] The final ground for the claim was that 'the ultimate gift to charity was void for uncertainty and vagueness'.[223] On October 1958, Edmonds J in the Supreme Court of Kenya held that the *Waqf* was 'ineffective' and the Court of Appeal for Eastern Africa upheld his decision in December 1959.[224]

The adopted daughters appealed to the Privy Council and were represented by Dingle Foot Q.C. and R.K. Handoo who made the following main submissions, inter alia, for the validation of the *Waqf*.[225] Firstly, the appellants argued that the Wakf Commissioners Ordinance 1951 was promulgated to advance the legal position of *Waqfs* as understood by Islamic law before *Abul Fata* and, therefore, Islamic law places 'no limitation upon whom a wakf can be made, provided only that there must be a permanent alienation from the settlor.[226] The appellants insisted, 'Under true Mohammedan law a wakf could be made for a stranger and his descendants'.[227] This is consistent with the Islamic legal tradition's internal view as Islamic jurists have emphasised that Islamic law prescribes that a condition attached to a *Waqf* must be construed using the principles of Islamic interpretation.[228] Further, it is true that Islamic law affirms that adopted children are not direct descendants of those who adopt them; Allah says in the Quran,

221 Ibid. The Wakf Commissioners Ordinance 1951 (Wakf Commissioners Ordinance).

222 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* 15–16.

223 Ibid. 16.

224 Ibid.

225 Ibid.

226 Ibid. 17.

227 Ibid. 20.

228 Alzargā, *Aḥkām Alwaqf*, 155–166.

> . . . nor has He [Allah] made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the (Right) Way. (4) Call them (adopted sons) by (the names of) their fathers, that is more just with Allah. But if you know not their father's (names, call them) your brothers in faith and Mawâlîkum (your freed slaves).[229]

This being the case, under Islamic intestacy laws, adopted children *are not* directly entitled to inheritance as only a son or a daughter who is a direct descendant of the deceased can inherit.[230] For this reason, adoptive parents may wish to create a will or a *Waqf* in their adopted children's favour. Alzargā affirms that a man of full health—with no debts—is free to create a *Waqf* for whomever he wishes and for the amount he wishes, unless he makes it a *Waqf* conditional on his death (in that case, he could only create a *Waqf* for a third of his wealth).[231] This illustrates the flexibility of the *Waqf* system as it could be used to mitigate the rigidity of the strict and detailed Islamic intestacy laws by placing the property in an inter vivos *Waqf;* thus, placing it outside the ambit of Islamic intestacy laws. In short, whether children are adopted or direct descendants has no bearing on the validity of a *Waqf* under Islamic law; rather, its impact and ramifications are brought to the fore under Islamic intestacy laws.

The appellants took precaution and submitted that they do 'come within the expression "family" ' as understood by the Oxford Dictionary, even if such an 'adoption is not recognized by Moslem law'.[232] The appellants also submitted that a *Waqf* may be partially validated, as is discussed towards the end of this section.[233]

In response to that, the respondents, represented by T.J. Inamdar Q.C., Mervyn Heald and S.I. Inamdar, submitted that this *Waqf* was created in 1942 before the Wakf Commissioners Ordinance 1951 was in place.[234] The implication they allude to is that *Abul Fata* applies to this particular *Waqf* as it was constituted before the 1951 Ordinance.[235] However, as mentioned in the analysis of *Bakhshuwen* above, the initial position adopted by judges in East

229 *The Holy Quran* (33: 3–4) [as translated by Dr. Mohsin].

230 Yahya Bambale, *Acquisition and Transfer of Property in Islamic Law* (Malthouse Press Limited 2007), 81.

231 Alzargā, *Aḥkām Alwaqf*, 89; Alkubaysī 129.

232 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* 20.

233 Ibid. 21.

234 Ibid.

235 Ibid.

Africa was that Indian precedents did not apply to East African colonies or jurisdictions.[236] This position was reversed in the Privy Council cases of *El Riami* and *Bakhshuwn* that were decided in 1946 and 1952 respectively. Both cases were decided after the creation of the *Waqf* in this case. Even the respondents admit that the *Waqf* in this case 'was made in 1942 at a time when the Muslim community in Kenya was under the impression that Muslim law applied to wakfs in its full force.[237] The point is this: if one accepts that the 1951 Ordinance does not apply retrospectively to the 1942 *Waqf* in question, how can one then retrospectively invalidate that very same *Waqf* using two cases that were both decided after the constitution of the *Waqf*? The appropriate position would have been to apply the law in Kenya that was in place at the time of the *Waqf* to avoid applying laws retrospectively. The policy danger with retrospective laws in this area is that as *El Riami* and *Abul Fata* could be used—retrospectively—to invalidate *Waqf*s, the 1951 Ordinance also has that same capacity to be applied retrospectively, which could potentially lead to an argument for the validation of many historic *Waqf*s using the 1951 Ordinance.

The respondents made other submissions. Among their main submissions was that *Waqf*s should not be partially valid and partially invalid, they should either be wholly valid or wholly invalid.[238] This submission was rebutted by the appellants and is discussed below in the analysis of Lord Evershed's judgment.

The respondents, however, usefully explain how the English rule against perpetuities applies to *Waqf*s. The problem was not the existence of a *Waqf* in perpetuity; rather, it was precisely that 'the vesting of the property is delayed too long'.[239] In fact, an interest in a *Waqf* property will almost never vest. This is a helpful insight into pinpointing the exact point of tension between the Islamic legal system and common law. The issue is not the length of the settlement; it is the remoteness of vesting of its interests. This insight underscores the point at which family *Waqf*s fail the test of the common law's rule against perpetuities.

The respondents also submitted that Islamic law does not recognise adopted daughters or children, which would mean that family *Waqf*s could not be created in their favour.[240] As is illustrated above, the fact that Islamic law does not

236 See *Seif bin Abdulla v Administrator General*.

237 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* 21.

238 Ibid. 24.

239 Ibid.

240 Ibid. 26.

recognise adopted children is not necessarily fatal to a *Waqf* created in their favour.

The appellants then made the argument that the 1951 Ordinance was promulgated to validate family *Waqfs* and could therefore not be used to invalidate other forms of *Waqf*.[241] Although this may be true, it does little to save the *Waqf* in point, as it could be argued that since the 1951 Ordinance was only promulgated to validate family *Waqfs, Abul Fata* could still apply to other forms of *Waqf* and invalidate them.

Lord Evershed then delivered judgment on behalf of the board. In *Riziki*, in the same vain as Lord Hobhouse's judgment in *Abul Fata*, Lord Evershed understandably displayed some discomfort at having to adjudicate on questions of Islamic law, describing 'a certain feeling of unreality in being invited to treat a document so framed as being an expression of the principles . . . [of] the ancient Mohammedan conception of wakf'.[242]

Lord Evershed acknowledged that the Privy Council and Indian courts' decisions regarding *Waqf*s (for example, *Abul Fata*) have 'been regarded as failing in true appreciation' of the principles of Mohammedan law.[243] Despite that, he maintained that the legislation that was passed to validate family *Waqf*s—such as the Wakf Validating Act 1913 and the 1951 Ordinance—has been passed by legislators who accepted the Privy Council decisions as 'effective interpretations of the law'.[244] What follows, according to Lord Evershed, is that 'such legislation must be construed accordingly'.[245]

Lord Evershed's position is difficult to justify. Parliament had passed an Act that made valid what the court rendered invalid. It is conceded that Parliament did not pass a retrospective Act validating those specific *Waqf*s that had been invalidated and set aside prior to 1913 in British India. Consequently, it is plausible that Parliament did accept the court's interpretation as valid or effective *only* retrospectively. Saying, however, that the court's interpretation

241 Ibid. 29.

242 Ibid. 32.

243 Ibid. 31.

244 Ibid. His full remark is, 'Their Lordships are aware that recent decisions of the Indian and other courts, including decisions of the Privy Council have, by some learned in the principles of Mohammedan law, been regarded as failing in true appreciation of those principles. But, in their Lordships' opinion, it cannot be in doubt that the legislation in Kenya and other countries, aimed at validating certain documents as effective wakfs, has been passed on the basis that these decisions have been accepted by the respective legislators as effective interpretations of the law: and such legislation must be construed accordingly'.

245 Ibid.

is valid prospectively even after legislation by Parliament—as Lord Evershed seems to say—only serves to create a paradox. On the one hand, Parliament wishes family *Waqf*s to be valid; clearly a wish that is not in accordance with the court's interpretation. On the other hand, contending that Parliament has also accepted the court's interpretation as 'effective', regardless of its wish to repeal the effect of such interpretation, leaves us with an unworkable situation. For Parliament to accept the court's interpretation would mean that it did not wish to give effect to its own intention. Moreover, Lord Evershed did not explain his statement further or qualify it in any sense, leaving us with no workable formula in which his assertion can have practical meaning. In other words, Lord Evershed seems to assert that parliamentary legislation that is directly opposed to a court's interpretation should be construed in accordance with the very interpretation it has set to repeal. The danger of this was highlighted by the appellants before Lord Evershed delivered his judgment, '[i]t would be absurd in construing the words in section 4(1), which requires that the wakf must "in every other respect" be in accordance with "Muslim" law: to have regard to the cases of *Abul Fata* and *Bikani Mia*, since it was the object of the Ordinance to get rid of the effect of those cases'.[246]

One could view this sceptically as a colonial technique that, on the one hand, appeased the colonised people by passing legislation that was in their favour, and, on the other hand, used courts to exploit those very same colonised people by not applying or partially applying the appeasing legislation. This is also a common political technique best described by Fuller, '[i]t is unfortunately a familiar political technique to placate one interest by passing a statute, and to appease an opposing interest by leaving the statute largely unenforced'.[247]

In any event, the radical form of judicial activism that seemed imminent did not materialise as Lord Evershed did not continue to directly challenge parliamentary sovereignty; he pursued a more subtle and less controversial means to achieve his intended result. Nonetheless, the effect was still the same as to invalidate family *Waqf*s, Lord Evershed construed the 1951 Ordinance literally. Section 4(2) of the 1951 Ordinance states:

> No wakf to which subsection (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect

246 Ibid. 29.

247 Lon L. Fuller, *The Morality of Law* (Yale University Press 1969), 153.

> until after the extinction of the family, children, descendants or kindred of the maker of the wakf.[248]

Being aware of the Islamic legal position of adopted children, Lord Evershed declared that as adopted children were not covered by s.4(2), including them in a family *Waqf* deed would render the family *Waqf* 'invalid'.[249] Yet, the classes of beneficiaries stated in s.4(2) were not meant to be exhaustive, but merely indicative of the main classes of beneficiaries that are normally named in family *Waqf*s. This is gleaned from s.2 of the very same Act; it defines a 'wakf ahli', or a family *Waqf*, as 'a wakf made for the benefit of an individual or family or for the performance of rites or ceremonies recognized by Muslim law as being for the benefit of the soul of an individual (including the dedicator) or of the souls of the members of a family'.[250] The definition contained in s.2 is much wider; the term 'for the benefit of an individual' includes adopted children, as the term 'family' that immediately follows is reserved for family members, including direct descendant children.

Again, the court in *Riziki*, as in *Bakhshuwen*, dealt with legislation to ensure that it met a desired end; or, at least, to ensure that it did not impede it. The court manipulated the wording of the legislation, again undermining Parliament's will, to invalidate a *Waqf* that was perfectly valid by the wording of the very same Act that the court relied on. Perhaps policy dictated such a judgment to ensure that more land could be procured and less could be tied up perpetually. However, an alternative policy consideration would have been to assess the harm that would befall the adopted daughters—and the ultimate charitable purpose designated by the settlor—that would result from invalidating that particular *Waqf*. If such harm (that mainly consisted of financial insecurity in an impoverished land) could not be avoided, it should have at least been minimised in some way. Unfortunately, that was not the case.

Going against Islamic legal doctrine, Lord Evershed contended that 'an instrument must either be effective to create a wakf in its entirety or, if no such wakf was created, the instrument is totally void'.[251] Lord Evershed viewed the *Waqf* from a common-law prism, finding the trust law's 'three certainties' rule as an ideal way by which to scrutinise the *Waqf* in question. Under the 'three certainties' rule, a trust is not valid unless the three certainties are

248 The Wakf Commissioners Ordinance 1951, s.4(2).

249 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* 39.

250 The Wakf Commissioners Ordinance 1951, s.2.

251 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* 39.

satisfied: the certainty of intention, subject matter, and objects.[252] What Lord Evershed was specifically alluding to was the certainty of objects or beneficiaries which affirms that, outside of charitable trusts, 'it must be possible for the courts positively to enforce and control [trusts] in the event that the trustees fail to perform their duties. For this reason there must be no linguistic or semantic uncertainty, otherwise known as conceptual uncertainty, in the description of trust beneficiaries'.[253] Lord Evershed argued that this *Waqf* was uncertain as to its objects and must therefore fail. Lord Evershed's position will be held to scrutiny from both a common law and an Islamic law perspective.

First, from a common law perspective, the *Waqf* instrument is entirely clear as to who its objects are; the two adopted daughters. Using the test in *IRC v Broadway Cottages Trust*, which was good law at the time of *Raziki*, for certainty of objects in fixed trusts, one should be able to draw up a 'complete list' of all the beneficiaries.[254] In *Raziki*, a 'complete list' could be drawn up, as it is clear that the objects were the two adopted daughters and their descendants. Therefore, under the common law, the certainty of objects is not a contestable issue. It must be the case, then, that Lord Evershed was referring to s.4(2) and his restrictive literal interpretation of it which led him to the conclusion that as the section did not cover adopted daughters there was uncertainty of objects. This could have been reconciled if his Lordship adopted the wider definition of family *Waqf*s in s.2. Nonetheless, as illustrated by the fixed trusts test discussed above, the *Waqf* could not be invalidated for uncertainty of objects. Further, in absence of an explicit prohibition of designating adopted children as beneficiaries of a family *Waqf* in the ordinance, and bearing in mind the wide definition of family *Waqf*s in s.2 of that same ordinance, using that very ordinance to bar adopted children from benefitting from family *Waqf*s is unjustified. Lord Evershed's judgment seems to confuse evidential certainty with conceptual certainty. In *Riziki*, we are certain as to who is to benefit from the *Waqf* and therefore it should not be relevant that the beneficiary is described in a way that is conceptually uncertain. In other words, the settlor is certain that she wanted to benefit her two adopted daughters, it should not matter that the two adopted daughters are not deemed to be daughters under Islamic law.

Secondly, from an Islamic law perspective, a *Waqf* is not void for uncertainty of object. Under Islamic law, if a *Waqf* does not designate an object, an

252 *Knight v Knight* (1840) 3 Beav 148, 173. The term 'three certainties' was used in *Re Kayford Ltd* (*In Liquidation*) [1975] 1 All ER 604, 607.

253 Mitchell 164.

254 *IRC v Broadway Cottages Trust* [1955] Ch 20, CA.

implied *Waqf* for the poor will be created.[255] This is also applicable to family *Waqf*s. In his book on Mohammedan law, Ameer Ali states, 'the failure of the primary object or objects of the [Islamic] trust does not avoid the trust but only accelerates its ultimate application to the poor'.[256] This has also been confirmed in British Indian case law, in *Muthukana Ana Ramanadham Chettiar v Vada Levvai Marakayar*, it was held that if one or several of the objects of a *Waqf* fail, the lawful objects of the *Waqf* will be entitled to the entire property.[257] Both the doctrinal authority from Ameer Ali and the *Muthukana* case have, amongst other authorities, been cited by Dingle Foot QC's submissions for the appellants in *Riziki*.[258] Dingle Foot QC asserts, '[a] wakf is completed assuming, of course, that the property is capable of permanent dedication and that the wakif [the settlor] had the necessary capacity'.[259] After all that authority Dingle Foot QC cited, Lord Evershed's only comment was, 'their Lordships have been unable to derive from the cases cited by Mr. Foot sufficient authority for such partial validation'.[260]

In the end, even one of the main lines of reasoning Lord Evershed relied on, namely that adopted daughters were not covered by the term 'family' in the Ordinance, was, as he proclaimed, 'unnecessary to consider'.[261] His line of reasoning relating to uncertainty of objects seems unjustified from both a common law and an Islamic law perspective, as shown above. Lord Evershed's laboured reasoning is suggestive of a judge who seemed intent on invalidating a *Waqf* that in retrospect seemed legal and valid. Lord Evershed was adamant on upholding the principle of precedent, a pinnacle feature of the common law tradition, even if this meant that the law was manipulated to achieve that end. In the words of Sir Roland Wilson, 'a judge is not at liberty to decide a point of law according to his own reading of a mediaeval Muhammadan treatise . . . in opposition to a single decision of the Privy Council, or in opposition to a series of decisions of the High Court which he represents or to which he is subordinate'.[262]

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255 Alzargā, *Aḥkām Alwaqf*, 52–53.

256 Ameer Ali, *Mohammedan Law*, vol 1 (4th edn, Calcutta 1912), 385.

257 *Muthukana Case* (1910) ILR 34 Mad 12, 18.

258 *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* 27–28.

259 Ibid. 28–29.

260 Ibid. 40.

261 Ibid. 39.

262 Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 92–93.

Raziki, along with *Abul Fata*, illustrate a trend that is as follows. If an Islamic legal question is brought before common law judges, some judges would be more inclined than others to apply the common law solution—as opposed to the Islamic law solution—to that very same question. Lord Evershed did not uphold precedent for the sake of it; precedent in *Raziki* simply meant that the common law rule against perpetuities would be allowed to defeat the *Waqf*, as it would in the common law defeat a trust. It was the common law policy of egalitarianism of future owners as opposed to liberality of contemporary owners that prevailed. Unfortunately, this narrow view of policy left equally valid policy considerations unanswered: namely, the mischief that both the adopted daughters and the ultimate charitable purpose would suffer as a result of the invalidation of this particular family *Waqf*.

3.4 *Repercussions of the Judicial Decisions*

Lawson and Rudden state, 'the function of the law relating to private property is to provide us with a bag of tools with which to achieve our wishes'.[263] It follows that if judges were indeed eager to uphold the principle of party autonomy—as claimed by Lawson and Rudden—they ought to uphold the wish of the transacting parties to be governed by Islamic law.[264] In order for judges to do so, it is incumbent upon them to understand the tensions that exist between common law and Islamic law. As was demonstrated by the discussion of the cases, a tension exists between the common law and Islamic law. In order for any attempts at reconciliation to succeed, it is essential to acknowledge and understand this tension. It is not enough to assume that the principles of party autonomy and individualism will trump, since when there are ostensible conflicts between legal systems, upholding such principles will not be at the forefront of the debate.

When submitting to the jurisdiction of English courts, Muslims should know and accept that the courts have interpretative powers that may result in novel or innovative interpretations. James W. Skillen expands on this point, 'If Muslims can accept the contextualization of parts of Shari'a within a pluralistic society that denies Shari'a the role of the highest public legal authority, then

263 F.H. Lawson and Bernard Rudden, *The Law of Property* (3rd edn, Oxford University Press 2002), 4.

264 See *Attorney-General v Observer Ltd* [1990] 1 AC 109, 178, where Sir John Donaldson states, '[t]he starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or statute'.

there might be room for accommodation'.[265] Adhar and Aroney argue that if Muslims desire Islamic law to have some application in the 'public square', then '[t]he question of the role for Shari'a is not one for specialists alone'.[266] Adhar and Aroney go further and question whether Islamic law can be interpreted and applied in the West without 'assimilating it into irreducibly Western and derivatively Christian thought-forms'.[267]

The key tension between Islamic law and common law in the area of property law is the underlying aim of property law in both discourses. In Islamic law, the protection of property is sacred and thus Islamic law places a great emphasis on protecting private ownership.[268] The prophet Muhammed said, 'he who dies protecting his property is a martyr'.[269] This does not mean that one may arbitrarily act as one pleases with one's own property. Yahaya Bambale explains, 'Islamic law recognizes the right of private ownership through legal possession of all types of property but does not leave the individual entirely free to use the right in any way he likes'.[270] The constraints are those imposed by Islamic law and are therefore internal constraints.[271] In other words, when determining questions of Islamic law, no recourse to external factors such as market forces or politics is necessary; rather, determining the law is a largely formalistic enterprise concerned with delimiting what the substantive law is and applying it to a given situation.[272] As judges in Islamic law are largely disengaged from the interpretative process, they cannot bring the interests of the state to bear on their deliberations as they serve a highly functional role;

265 James W. Skillen, 'Shari'a and Pluralism' in Rex Ahdar and Nicholar Aroney (eds), *Shari'a in the West* (Oxford University Press 2010), 100.

266 Rex Ahdar and Nicholas Aroney, 'The Topograhpy of Shari'a in the Western Political Landscape' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press 2010), 3.

267 Ibid. 11.

268 Hallaq, *Shariah: Theory, Practice, Transformations*, 109.

269 Moḥammad Nāṣir Aldīn Alalbānī, *Irwā' Alghalīl* (Almaktab Alislāmī 1399 AH), *Ḥadīth* no. 708.

270 Bambale 6.

271 In essence, these constraints boil down to one vital key aim: 'private property is sacrosanct as long as it does not prejudice the rights of others'. See Hallaq, *Shariah: Theory, Practice, Transformations*, 301.

272 'Formalism . . . is precisely about restricting the loci of meaning to the observable features of language, such that the perspective or presuppositions of any would-be interpreter are neutralized or at least limited'. Sherman A. Jackson, 'Toward a Functional Analysis of Usul Al-Fiqh' in Bernard G. Weiss (ed), *Studies in Islamic Law and Society* (Brill 2002), 191.

merely, to apply that which has been engaged with and interpreted by the Islamic jurist.

In essence, Islamic property law, to a certain extent like English common law, prescribes negative obligations that are parochial and clearly defined; as long as one does what Islamic law enjoins and does not do what Islamic law prohibits, Islamic law has no concern about what one does with one's property.[273] Therefore, it would be accurate to conclude that, without inflicting harm on other persons or groups, a person is free to use his property or transact in property just as he wishes as long as it is a way that adheres to Islamic law in its strictly formalistic interpretation.[274] This is not to say that commercial considerations are not taken into account in Islamic law; they indeed are to a certain extent, though not to the satisfaction of proponents of English law. Sir Roland Wilson criticises, 'Up to a certain point, indeed, the spirit of Islam is very sympathetic towards commerce . . . But the whole law of sale, mortgage, and loan is fatally vitiated by the anti-usury craze'.[275]

While common law—as any legal system—protects property, it does so while taking into account wider economic considerations.[276] Ben McFarlane argues that English property law 'softens the sting' of the clash between market forces, commerce, social protection and home life.[277] Lawson and Rudden even argue that 'law seems always to lag behind commerce'.[278] They believe that commerce creates innovations that leave lawyers with the responsibility to accommodate them.[279] This is because the common law is commercially instrumental: by reacting to market or commercial practice it purports to

273 Lawson and Rudden have described English property law in the same vain, 'The law of property imposes no positive duties on anyone . . . the law does not bid us to act, it forbids us to act'. See Lawson and Rudden 63.

274 Jackson 200. Although he later propounds a new theory, Jackson accepts that traditional accounts of *Usul al-fiqh* (Islamic legal interpretative theories) are based on two ideas (which he depicts as fictions): first 'that language has the ability to dictate meaning independently', and second, 'that legal theory is the exclusive and causative source of legal conclusions'.

275 Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 49.

276 Islamic law also looks beyond the individual but only to the extent of the protection of society from any harm that can be caused through the individual's ownership of property. Bambale 9.

277 Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008), 5.

278 Lawson and Rudden 29.

279 Ibid. 21.

further efficiency and productivity.[280] This is also true in the area of property law. Ben McFarlane affirms:

> [I]t would be dangerous if, by attributing too much value to the sanctity of the doctrinal rules, judges lost sight entirely of the effect of their decisions . . . both Parliament and judges *have* departed from the doctrinal rules where this is felt necessary to achieve a more practically convenient result. The needs of **practical convenience** may thus in some cases conflict with the doctrinal solution.[281]

The term 'practical convenience' denotes the pliability of the common law, yet fails to address the arbitrary nature of the judicial activism necessary to advance such 'practical convenience'. Thorpe LJ believes that laws 'are no longer sufficient to meet the needs of the world', and therefore '[j]udges have a separate responsibility to make their contribution'.[282] In any event, the 'practical convenience' in the common law is what makes it appealing and it is also a character that one hopes will aid in reconciling it with Islamic law in the issue of *Waqf*s and trusts.

4 Reconciliation

While the Islamic law and English law positions on *Waqf*s and trusts appear conflicting, there is still much scope for reconciliation. The word reconciliation denotes that the reconciling act is undertaken on the part of both legal systems. It is an act of setting aside the most rigid and unworkable interpretations, to be replenished with interpretations, in both legal systems, that are from within the legal system itself and that adhere to its fundamental tenants and philosophy. I reiterate, to be convincing, reconciliation must be undertaken by both legal systems.

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280 William Twining and David Miers, *How to do Things with Rules* (Cambridge University Press 2010), 114. The basic idea behind instrumentalism is that 'the role of the interpreter is to further the intention of the legislator, either in respect of furthering particular policies or to promote certain ideas or principles'.

281 McFarlane 56.

282 Mathew Thorpe, 'The Case for Judicial Activism' [2004] International Family Law. Though, one must note that Thorpe L.J. is a family law judge, which is an area that is much more prone to judicial activism than property law.

Some academics have argued otherwise, that in a Western liberal society, if Islamic law was to be applied, it must be interpreted in the most Western and liberal ways. Gaudreault-DesBiens contends, 'the challenge, in my view, lies in finding a way to structure the interplay between religious and positive legal orders so as to encourage the predominance of the most liberal strands of interpretation available'.[283] If Gaudreault-DesBiens means liberal in the sense described in the previous paragraph, then his position is accepted. If, however, liberal is merely a synonym for Western values, then his position is rejected. In Simon Lee's words, 'there is no cause to regard liberalism as necessarily a superior creed solely because it is sometimes represented as being morally neutral . . . liberals, like everyone else, want the law to enforce morality—their morality of liberalism'.[284] In short, liberalism—as other ideologies—is dogmatic and when two dogmatisms (Islam and liberalism) meet, one will inevitably have to make way for another.

In the area of property law, Andrew White who has proposed reforms to *Waqf* law that would make *Waqf*s very similar if not identical to trusts has adopted an approach similar to Gaudreault-DesBiens. For our purposes, in the context of family *Waqf*s, I will only discuss two of his proposed reforms. First, he suggests that family *Waqf*s should remove the requirement of an ultimate 'religious, pious, or charitable' purpose.[285] Second, he proposes that the perpetuity requirement should be abandoned.[286] While White does make policy arguments to justify his proposed reforms, he does not back his argument with Islamic legal doctrine. Even if one assumes that his reforms are consistent with Islamic law, and according to some schools of thought they are, the fact that he does not couch his argument in a way that is backed by Islamic legal doctrine undermines it from an Islamic perspective. The reason the whole *Waqf* system is respected and held to be pious by Muslims is that 'it is governed by a law considered sacred'.[287] The *Waqf* system is not as rigid as some have portrayed, and

283 Jean-Francois Gaudreault-DesBiens, 'Religious Courts, Personal Federalism, and Legal Transplants' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press 2010), 61.

284 Simon Lee, *Law and Morals: Warnock, Gillick & Beyond* (3rd edn, Oxford University Press 1986), 15.

285 Andrew White, 'Breathing New Life into the Islamic *Waqf*: What Reforms can *Fiqh* Regarding *Awqaf* Adopt from the Common Law of Trusts without Violating *Shari'ah*?' (2006) 41 Real Property, Probate and Trust Journal 497, 520–521.

286 Ibid. 525.

287 Timur Kuran, 'The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System' (2001) 35 Law and Society Review 841, 842.

writers have 'exaggerated its inefficiencies'.[288] Therefore, reconciliation efforts cannot be arbitrary and merely policy driven, they must make a real effort to find justification in Islamic legal doctrine.

The real solution lies in researching the legal systems themselves, for many of the answers lay there. Reconciliation is possible in three main ways. First, by re-thinking the interpretation of Islamic *Waqf* law that is now mainstream in Western legal understanding, and in particular, by re-thinking Islamic *Waqf* law's position regarding perpetuities. Second, in light of other common law jurisdictions' shifting stances on perpetuities, the English position on perpetuities could be rethought as well. Thirdly, without reforming *Waqf* or trusts law, the English legal system can create an exception to accommodate *Waqf*s. Such exceptions have now been provided for in some offshore jurisdictions and they will be discussed below.

4.1 *Reconciliation by Reforming* Waqf *Perpetuities Law*

Interestingly, in his famous treatise on perpetuities, John Chipman Gray briefly questions whether a trust that took a similar shape to a family *Waqf*, engages the rule against perpetuities.[289] Gray states,

> . . . where a trustee who holds property in trust for an individual is directed, on the happening of a remote contingency, to hold it on a charitable trust, it might fairly be contended that no question of the application of the Rule against Perpetuities arises. That Rule concerns itself with the beginning, not with the end, of estates. There is therefore no harm in the equitable estate of the individual ending at a remote period. There is no change in the legal estate, and the only matter which can be thought obnoxious to the Rule against Perpetuities is that the charitable trust begins at a remote period. But under the charitable trust no one has any rights, and as the purpose of the Rule against Perpetuities is to prevent the creation of remote rights, it might be argued that the Rule has no application.[290]

Although accepting the plausibility of this 'contention', Gray then dismisses it for the 'better opinion' that characterises charitable trusts as entities 'for the

288 Ibid. 889.

289 Gray was not referring to a *Waqf* per se; he was merely referring to a similar structure without making any reference to *Waqf*s. For our purpose, this is an insightful coincidence.

290 Gray 364.

purpose of deciding questions of remoteness'.[291] This 'better opinion' also has a basis in case law in *Cherry v Mott*.[292] Additionally, and essentially, from a common law perspective, *Abul Fata* provides a specific ruling on the issue of the remoteness of ultimate charitable purposes in Family *Waqf*s, so scope for Gray's initial contention here is all but redundant.

In any event, there is a gap between *Waqf* law in theory and *Waqf* law in practice. And '[a]s the temporal distance between a *waqf*'s foundation and the present increased, the temptation grew stronger to seize such property and use it to satisfy some immediate pressing need'.[293] According to Kozlowski, even 'Umar, the Second Caliph's *Waqf* of *Sawad* in Iraq 'was exhausted by successive encroachments'.[294] In light of this, before mandating perpetuity, Islamic jurists should question whether *Waqf*s could be durable in perpetuity; according to Kozlowski, they could not be. Therefore, it may be the case that prospective *Wāqif*s should consider having more modest wishes with regards to their *Waqf*s. From a macro perspective, what large perpetual *Waqf*s are sought to achieve could potentially be better served by smaller, temporary but more numerous *Waqf*s.[295]

There are, however, some potential practical reforms to be made, such as creating a *Waqf* that is held by a corporation, as a corporation can own property in perpetuity.[296] While this may be feasible from a practical point of view, from a theoretical point of view, it does little to ease the tension that exists between *Waqf*s and trusts. This being the case, and given how offensive *Waqf*s are, in their current form, to the rule against perpetuities, it is more than likely that courts or the legislature will eventually close this loophole to *Waqf*s if it were exploited. Besides, skilful drafting cannot circumvent the rule against perpetuities. The Law Commission report states, 'the rule against perpetuities is an absolute one. Its effects cannot be circumvented by skilful drafting . . . The reasonable wishes of settlors will often be incapable of fulfilment or will run the risk of being defeated by an absolute rule that cannot be side-stepped'.[297]

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291 Ibid.

292 *Cherry v Mott* [1836] 40 ER 323, quoted by Gray 368.

293 Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge University Press 1985), 14.

294 Ibid. 15.

295 Monzer Kahf, *Alwaqf Alislāmī: Taṭūruhu, 'Idāratuhu, Tanmiyatuhu* (2nd edn, Dār Alfikr Almu'aṣir 2006), 106–108.

296 *Bowman v Secular Society* [1917] AC 406.

297 *The Law Commission Report No 251*, 1.3.

Another potential and less conflicting practical avenue for *Waqf*s to operate in the English system would be to create mixed *Waqf*s (*Waqf Mushtarak*).[298] These would be *Waqf*s that would serve the poor as well as family beneficiaries from the outset, as opposed to serving family beneficiaries, then the poor in the event of the former's extinction. There is nothing in Islamic law against such *Waqf*s. Equally important, the common law has, in colonial times, upheld such *Waqf*s. In *Ramandhan Chettiar*, the court upheld a *Waqf* for the poor, specifying a particular sum per annum for them, with the residue of the emoluments going to his family.[299] However, this case is over a hundred years old and it is unclear how courts would treat similar settlements today. Moreover, having the poor share the *Waqf* income from the outset will diminish the family beneficiaries' shares, an outcome that might not be desirable to the *Wāqif* or family beneficiaries. Or perhaps, when the rule against perpetuities has been 'overstepped', courts could save the trust by cutting it down to be within the perpetuity period.[300] But, again, this would be a forceful alteration of Islamic *Waqf* laws, something that should and could be avoided.

A workable reconciliation could be reached, not by mere policy arguments, but by advancing the *Mālikī* school opinion, discussed earlier, that allows temporary or non-perpetual *Waqf*s.[301] This would take us from a position of direct conflict of legal doctrine to one where we have clear congruence, at least on the issue of perpetuities, which is a major stumbling block. Moreover, it would be a step towards reconciliation that is justified by the 'sacred' law and would thus be accepted from an Islamic perspective. With regards to perpetuity, my criticism of White's position above could be viewed as merely semantic. However, semantics, in this highly sensitive area, make all the difference on whether a reform is viewed as justified from a perspective internal to a legal system, or not.

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298 Kahf 158; Magda Ismail Abdel Mohsin, 'Revitalization of waqf administration & family waqf law' (2010) 7 US-China Law Review 57, 58.

299 *Ramanadhan Chettiar* (1910) 34 Mad 12, confirmed by the Privy Council in *Ramanadhan Chettiar* (1916) 40 Mad 116, quoted in Wilson, *Anglo-Muhammadan Law: A Digest Proceeded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, With Full Reference to Modern and Ancient Authorities*, 351.

300 This was in fact done by a New Hampshire Supreme Court Case in the U.S. See *Edgerly v Barker* (1891) 66 NH 434, 31 Atl 900, quoted in Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror', 746.

301 Monzer Kahf is a strong contemporary advocate of the *Mālikī* opinion. See Kahf 106–108 & 150.

4.2 *Reconciliation by Reforming English Trusts' Perpetuities Laws*

The doctrine of precedent in common law is a double-edged sword. While following precedents makes the law certain, which is *a desideratum* of the rule of law, it also means that the common law is a reactionary system. Murpy et al. state,

> Judging in England is a practical activity. One of the most important aspects of that activity concerns keeping the litigation process under control. And more than anything, this means keeping control over the volume of private litigation. One consequence of this is that, however bizarre or obscure or antiquated a rule is, there is no incentive to change it unless it causes inconvenience in a practical sense.[302]

Moreover, according to Arthur Hobhouse, following precedents can be archaic: 'it may be said that Courts of Law are bound by precedents, and that what they do is proof not of what this generation is thinking, but of what people thought at the time when each precedent happened to be made'.[303]

Nevertheless, the common law's flexibility means that it has readiness to adopt new ideas. Worthington states, 'the degree of divergence that now exists between different common law countries, despite these common origins, is testament to the inherent flexibility of a precedent-based evolutionary system' and '[i]f judges are so minded, new ideas can be readily integrated into the regime'.[304] This particularly true in private law, Murphy et al. note, ' "private law" really amounts to engendering a state of affairs in which owners of property can make the law concerning their property within the limits set by the public, general law (as in perpetuity rules'.[305]

For our purposes, assuming *Waqf* law remains as it is, and as viewed by the mainstream Western academics, could English law be amended to be more receptive to *Waqf*s in particular by being more receptive to perpetual settlements in general? In other words, could the rule against perpetuities be abolished?

The Law Commission did consider abolishing the rule in 1998. However, '[t]here was a widespread view that, if the rule were abolished, settlors would undoubtedly create future interests which they could not under the present

302 Tim Murphy, Simon Roberts and Tatiana Flessas (eds), *Understanding Property Law* (4th edn, Sweet & Maxwell 2004), 45–46.

303 Hobhouse 56.

304 Sarah Worthington, *Equity* (2nd edn, Oxford University Press 2006), 7.

305 Murphy, Roberts and Flessas 265.

law'.[306] In fact, various firms of solicitors reported that they had clients who wished to create trusts that they could not under the present law.[307] Despite that, the Law Commission, using the Scottish jurisdiction as a case study for a jurisdiction that has no rule against perpetuities, acknowledges that there is no necessary connection between the abolition of the rule against perpetuities and the rise of perpetual trusts.[308] In their words,

> What we discovered from our enquiries is that although perpetual trusts are created, they tend to be confined to public purposes, some of which are charitable and some of which are not . . . In practice, the maximum duration of trusts in Scotland was, we were informed, about 100 years. Most were of much shorter duration, and there was little pressure from clients to create long-term trusts . . . The mere fact that the law allows the creation of perpetual trusts does not lead settlors to create them. In Scotland few do. Other factors, such as taxation, or the risk of the disposition eventually failing for uncertainty, tend to encourage trusts to be set up for a comparatively short duration.[309]

One can speculate as much as one wants, but the bottom line is that the effect of the abolition of the rule against perpetuities cannot really be known until it actually happens. In the words of Leach, 'Manhattan Island is not sunk beneath the waves by an earthquake that might have happened. Washington is not destroyed by an atomic bomb that might have fallen. And the public interest is not damaged by a tying up of property that might have exceeded the period of perpetuities'.[310] While, according to Gallanis, the Islamic *Waqf*, being a 1400-year-old institution, is a 'living laboratory' for how trusts could operate without perpetuities laws,[311] it is contended here that a better and closely resembling 'laboratory' could be found in the American jurisdictions that have abolished the rule against perpetuities.

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306 *The Law Commission Report No 251*, 2.25.

307 Ibid. 2.25.

308 According to Leach, Family dynasty mentality has subsided since the 18th century flourish. See Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror', 726–727, he states, 'If there were at this present date no Rule against Perpetuities it seems unlikely that there would be a clamor for such a rule either in the legislatures or in the courts'.

309 *The Law Commission Report No 251*, 2.36–2.37.

310 Leach, 'Perpetuities in Perspective: Ending the Rule's Reign of Terror' 729.

311 Gallanis 289, fn 26.

The repeal of the rule against perpetuities movement started in the mid-1990s, originating in Delaware's abolishing its rule in 1995.[312] Waggoner argues that American movement to abolish the rule against perpetuities and create 'perpetual' trusts in some states 'has not been based on the merits of removing the traditional curb on excessive dead-hand control'.[313] State lobbyists lobbied for the 'perpetual-trust' as a result of an 'interstate competition for trust business'.[314] The proliferation of states abolishing the rule against perpetuities rose because of an exemption to the federal Generation-Skipping Transfer tax (GST tax).[315] If a trust creates interests that bypass a generation, federal estate or gift taxes no longer apply, so the GST tax was designed to fill this tax void.[316] However, the GST tax also has a tax-free exemption, which was initially set at $1 million ($2 million per married couple).[317] Recently, in 2010, Congress increased this tax-free exemption to $5 million ($10 million per married couple) and the cap was indexed for inflation.[318]

What is even more important is that a 'GST-exempt trust retains its exemption no matter how much the trust's post-creation value appreciates above the maximum exemption amount'.[319] When Congress promulgated the GST tax it did not place any limit as to the duration of the GST exemption, relying on state congresses to do so, and this, according to Waggoner, was a 'fatal mistake', which paved the way to the abolition of the rule against perpetuities and the promotion of dynastic trusts in numerous states.[320] Next, local lawyers and bankers lobbied states, as they 'began to see the marketing potential of offering trusts that would be perpetually tax exempt'.[321]

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312 Max M. Schanzenbach and Robert H. Sitkoff, 'Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust' (2005) 27 Cardozo Law Review 2465, 2474.

313 L.W. Waggoner, 'US Perpetual Trusts' (2011) 127 Law Quarterly Review 423, 423.

314 Ibid.; Madoff.

315 Waggoner 423; Schanzenbach and Sitkoff 2476.

316 Waggoner 423. For an explanation of the GST tax and its history, see Dukeminier and Krier, 1312–1315.

317 Waggoner 423.

318 Ibid.

319 Ibid.

320 Ibid.

321 Ibid. 424. The states that have abolished the rule against perpetuities are: Alaska, Delaware, District of Columbia, Idaho, Illinois, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Virginia and Wisconsin, see fn 2. Other states have extended their perpetuity periods, 1000 years in Colorado, Utah and Wyoming; 500 years in Arizona; 365 years in Nevada; 360 years in Florida, Michigan and Tennessee, see fn 3.

Waggoner questions 'whether the state legislators who vote to authorise perpetual trusts and the wealthy who create them have thought through what they are allowing or putting in place'.[322] Moffat et al. state, '[w]hat proponents of abolition may find disconcerting is that this development appears to be predominantly the results of a combination of fiscal advantages being made available for long-term trusts and jurisdictional competition for profitable trusts business'.[323] In any event, states raced to exploit this loophole to the advantage of their state economies,[324] and financial services have 'heavily marketed' dynastic trusts.[325] According to one commentator, the proliferation of dynastic trusts in the U.S. is a political statement by the rich 'who wish to avoid sharing their wealth with Uncle Sam'.[326] Joel Dobris believes that apart from 'a few law professors', 'tax bureaucrats' and some practitioners, no one really cares about the rule against perpetuities, and the rich are seizing the opportunity to 'push for advantage' without being pushed back.[327]

However, one must bear in mind that it is most often the case that tax incentives drive the development of 'estate planning techniques'.[328] In the case of perpetual trusts, Shanzenback and Sitkoff have empirically confirmed that prior to the GST tax 'there was little demand for perpetual trusts' in Idaho, South Dakota and Wisconsin, which were states that had already abolished the rule against perpetuities.[329] On the contrary, from the enactment of the GST tax, a state that had abolished the rule against perpetuities could expect a $6 billion increase in trust assets and a $200,000 increase in the size of an average trust account.[330] On the whole, approximately '$100 billion in trust assets moved as a result of the Rule's abolition'.[331] Gideon Rothschild, a New York lawyer, predicts that if 'a dynasty trust of roughly $1 million was established today . . . it would be worth $867.7 million after four generations, assuming that it grew 7 percent a year and nothing was spent'.[332] The figure would only be

322 Ibid. 425; Sneddon 195; Dukeminier and Krier 1316–1317.

323 Moffat, Bean and Probert 322.

324 Schanzenbach and Sitkoff 2477–2478.

325 Silverman.

326 Bruce W. Fraser, 'The Rush to Dynasty Trusts' *Financial Advisor* (1 June 2005) <http://www.fa-mag.com/news/article-1144.html accessed: 8 May 2013>.

327 Dobris 603–604.

328 Schanzenbach and Sitkoff 2466–2469.

329 Ibid.

330 Ibid. 2466–2469 & 2494–2495; Sitkoff and Schanzenbach 359.

331 Schanzenbach and Sitkoff 2466–2469 & 2494–2495; Sitkoff and Schanzenbach, 359.

332 Carole Gould, 'Personal Business; Shifting Rules Add Luster to Trusts' *The New York Times* (29 October 2000) 11 <http://www.nytimes.com/2000/10/29/business/personal-

$35.6 million 'if the property was given outright to future generations and was subject each time to an estate tax of up to 55 percent'.[333] Schanzenbach and Sitkoff conclude their study by stating,

> although the rise of the perpetual trust might appear to supply evidence of a dynastic impulse, our findings cast doubt on the validity of that inference. Instead, our findings underscore the importance of tax considerations in driving the structure of donative transfers by tax-sensitive wealth holders.[334]

Though, tax incentives and lobbying efforts are not the sole reason behind the proliferation of perpetual trusts in the U.S. In reality, people are increasingly becoming 'cognizant of the burdens of escalating medical costs accompanying increased life expectancy',[335] as well as the general higher expenses of life, and they are therefore more inclined to make provisions for themselves and their descendants to ease the burden. This coupled with society losing faith in government being 'a better spender or redistributor of money',[336] has led to an increase in trusts in general and perpetual trusts in particular.

Further, Dobris has given eleven main reasons for why the tide has shifted in favour of perpetual trusts in the U.S.[337] For example, he suggests that the general public does not see the justification for perpetuities laws.[338] He also says that the 'Rule is a Land-Based Relic in a World of Financial Assets'.[339] Besides, Dobris maintains that Americans are more used to wealth being held in corporate forms, which have no perpetuities restraint, so they are more used to the idea of perpetuity.[340] Also, people tolerate perpetuities more nowadays because they 'like rich folks these days',[341] and they fantasise about joining

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business-shifting-rules-add-luster-to-trusts.html accessed: 8 May 2013>. Please note, LM Friedman has criticised this article and has said that it 'is full of legal inaccuracies', see Lawrence Meir Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (Stanford University Press 2009), 209, note 24.

333 Gould.

334 Schanzenbach and Sitkoff 2497.

335 Sneddon 194.

336 Dobris 647–649.

337 For all eleven reasons, see ibid. 614–640.

338 Ibid. 634–645.

339 Ibid. 635–637.

340 Ibid. 638.

341 Ibid. 614.

their rank one day. According to one study, '70% of college students assume they will be millionaires'.[342]

Yet, some have expressed concern over the abolition of perpetuities laws in some U.S. states. One study provides,

> Some 150 years since its creation, a GST-exempt perpetual trust could have about 450 living beneficiaries; after 250 years, more than 7,000 living beneficiaries; after 350 years, about 114,500 living beneficiaries. This means that 350 years after creation, Wembley Stadium would not be large enough to hold them all . . . Four hundred and fifty years after a GST-exempt perpetual trust is created, the number of living beneficiaries of that one trust could rise to 1.8 million . . . [and] the task of ascertaining and verifying which persons qualify as beneficiaries will be enormously complex and expensive.[343]

In addition, trustees will most likely change many times over and 'successful lawsuits could very well bankrupt a family trust company'.[344] The skillset required of trustees running these dynastic trusts in the future encourages 'an entrepreneurial mindset in a fiduciary that would have been unthinkable in earlier eras'.[345] If these 'dynastic' trusts were to have any chance of prospering, the trustee will have to become a 'crucial figure'.[346] In other words, they have to become professionalised.

In their 2010 annual meeting, the American Law Institute (ALI) stated that the movement to allow perpetual trusts was 'ill advised' and suggested that trust duration should be limited to 'two younger generations'.[347] Despite ALI's prestige, they were 'overmatched in the state legislatures by the lobbying power' of lawyers, banks and financial institutions 'that have a financial stake in the higher profits they expect to reap from attracting and administering perpetual trusts'.[348]

Madoff also suggests that 'Congress could fix the problem by limiting the generation-skipping-transfer exemption to trusts that last no longer than

342 'They Will Be Millionaires' *USA Today* (24 January 2000) 1B, quoted by Dobris, fn 61.

343 Waggoner 426–427. For more on this, see John H. Beckstrom, 'Sociobiology and Intestate Wealth Transfers' (1981) 76 Northwestern University Law Review 216.

344 Waggoner 428.

345 Goodwin 504–505.

346 Ibid. 505.

347 Waggoner 429.

348 Ibid.

two generations'.[349] However, Congress is not interested, and, in the words of Dobris, 'the guardians of society are asleep at the gatehouse'.[350] The rule against perpetuities is highly technical and difficult to understand, and most people do not understand it or the policy reasons behind it, meaning that the U.S. government is not pressured to curb or reverse the abolition of the rule against perpetuities.[351] Also, Dobris affirms that the 'trustification of the prosperati's planning world leaves no room for distrust of trusts'.[352] There is no scope for the distrust of the trust institution because it has become so popular with the rich who are seen by ordinary Americans as benchmark setters and exemplary citizens.

Dukeminier and Krier believe that there are three policy concerns with abolishing the rule against perpetuities. The first policy concern is the problem of inalienability, which they do not pay much attention to because they believe that 'it can be avoided by any well-drafted trust'.[353] Second, they discuss 'the problem of first-generation monopoly'.[354] If the first generation were allowed to tie up the existing capital in perpetuity, then subsequent generations will only have the ability to tie up what they reserve from their income, and the balance that is created by the rule against perpetuities will heavily tilt in favour of the first generation.[355] Assuming that the second generation also ties up more property, the third generation would even be less advantaged until a point is reached where the increasing numbers of perpetually settled properties economically cripples society as less and less property would become freely transferable. The third policy concern is duration, which 'is a catch-all for a host of

349 See Madoff. Although the abolishing states abolished the rule against perpetuities, they did not abolish the rule against accumulations, and Sneddon believes that 'the Rule Against Accumulations is a small monkey wrench that may jam the gears of the perpetual trust machine that is gaining speed and strength'. See Sneddon 190. Also see p. 197, 'It could be that the Rule Against Accumulations is a way for courts, cognizant of the policies behind the Rule Against Perpetuities and the Rule Against Accumulations, to take such factors into account when evaluating the trust regardless of whether the jurisdiction has abolished the Rule Against Perpetuities. One commentator found the holding significant because "repeal of the Rule Against Perpetuities will not alone make dynastic [or perpetual] trusts possible where the Rule Against Accumulations still exists" '. Sneddon based her view on *White v Fleet Bank of Maine* (1999) ME 148.

350 Dobris 662.

351 Ibid. 656.

352 Ibid. 660.

353 Dukeminier and Krier 1319–1321.

354 Ibid. 1319.

355 Ibid. 1322.

difficulties that can arise as an uncertain future unwinds'.[356] Largely because of uncertainty, '[t]he longer trusts endure, the more troublesome they become'.[357] Changes in laws, trustees, management practice, number of beneficiaries, and custom all potentially present problems, '[t]he Rule against Perpetuities mitigates the difficulty by finally terminating trusts and forcing distribution of assets'.[358]

Finally, the English jurisdiction is not entirely comparable with the U.S. jurisdiction because England has more liberal modification and termination provisions.[359] In the words of Sitkoff and Schanzenbach, '[o]utright abolition represents a stark departure from a longstanding principle of Anglo-American common law'.[360] In addition, although various U.S. jurisdictions have abolished the rule against perpetuities, as of yet, not enough time has elapsed to understand the effect of perpetual trusts on the economies of those abolishing states. Perpetual trusts that have been created in the U.S. are such a recent phenomenon that none have yet exceeded the initial perpetuity period. Therefore, while the U.S. abolishing jurisdictions are a 'living laboratory' for the effects of perpetual trusts, the results of the 'laboratory' tests are still, and for a while yet, forthcoming. Hence, caution must be exercised when looking across the pond. Besides, in view of the concerns expressed by ALI and various academics about perpetuities, there is always the possibility that the laws abolishing perpetuities will be reversed, restoring the initial position banning perpetuities, before we have the chance to discern the long term effects of perpetual trusts.

4.3 *Reconciliation by Providing Legislative Exceptions for* Waqfs

Some leading Islamic jurists in the West have called for legislative exceptions for Islamic law. For instance, Kahf states, 'The fact that we live under secular constitutions must not be a limitation for seeking the enactment of such laws that may relate only to the Muslim community'.[361] While parallel legal systems undermine the rule of law, in the private law sphere, exceptions for religious norms are not injurious to the rule of law.

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356 Ibid. 1319.

357 Ibid. 1327.

358 Ibid.

359 Schanzenbach and Sitkoff 2483.

360 Sitkoff and Schanzenbach 368.

361 Monzer Kahf, 'Awqaf of the Muslim Community in the Western Countries: A Preliminary Thoughts on Reconciling The Sharia'ah Principles with the Laws of the Land' Available online: <http://monzerkahfcom/papers,html>, 10.

Some offshore jurisdictions already have 'variant types of trust' provisions that allow the recognition of trusts that 'belong to foreign systems'.[362] In Belize, s.61(1) of The Trusts Act 2000 provides, 'A settlor may create a trust (in whatever form and by whatever name it is known) of a type recognised by the law or rules of his religion or nationality or which is customarily used by his community'.[363] However, while Belizean and Anguillian laws potentially allow perpetual family *Waqf*s, they limit the duration in which the family beneficiaries can benefit to 125 years. After that, the ultimate charitable purpose must take benefit. S.62 of The Trusts Act 2000 states,

> A trust of a type approved under subsection (1) of section 61 may provide that the trustee shall hold the trust property—
>
> (a) for a period not exceeding one hundred and twenty years, to pay or apply the income and capital thereof for the maintenance, education, advancement or benefit of the family of the settlor, and/or for the purpose of performing acts or services in honour of the settlor or the ancestors of the settlor; and
>
> (b) thereafter for the advancement of the settlor's religion, or for such other charitable purpose as the settlor may specify or, if the settlor has not specified a charitable purpose, for such charitable purpose as the trustee shall determine.[364]

This restriction is contrary to *Waqf* law, as viewed by the mainstream in the West, as no time restrictions exist with the regards to the period in which family members can benefit from a *Waqf*. Accordingly, this solution does not absolve *Waqf* and trusts comparatists from seeking reform by employing internal hermeneutic methods to bring more compatible interpretations of *Waqf* and trusts law to the surface. In the case of perpetuities, it is clear how adopting the *Mālikī* opinion allowing temporary *Waqf*s potentially goes hand in hand with variant trusts provisions. The whole idea, from a theoretical perspective, is to reach solutions and reforms from the inside of conflicting legal systems to supplement the solutions that already exist outside. Although achieving

362 Maurizio Lupoi, *Trusts: A Comparative Study* (Simon Dix tr, Cambridge University Press 2000), 208.

363 The Trusts Act 2000 (Belize), s.61(1). An identical provision can be found in Anguilla, even promulgated in the same year and carrying the same name, see Trusts Act 2000 (Anguilla), s.64(1).

364 The Trusts Act 2000, s.62. See also, Trusts Act 2000 (Anguilla), s.65.

reconciliation this way involves more work, the reward of creating reforms that are internally credible and, therefore, more legitimate, is well worth the effort.

Conclusion

This chapter has shown that Islamic law and the common law are rich enough to provide internal answers for the tension that arises when *Waqf* and trusts laws collide. The three seminal colonial cases studied in this chapter illustrate the extent of the tension that exists between Islamic *Waqf* law and the law of trusts, and that if reform does not appease such tension, *Waqf*s and trusts would appear to be irreconcilable. Nevertheless, reconciliation is possible, and in various ways, as this chapter has demonstrated. The key is to encourage latent potentially comparable interpretations of Islamic and common law in favour of mainstream interpretations that are not in congruence. This guarantees reform that is workable as well as legitimate, rather than reform that is forced by one legal system upon another.

In our novel multicultural society, multiculturalism by its very nature dictates that the multiplicity of cultures must coexist as different cultures and not as one. In the sphere of private property law, this entails that party autonomy should be upheld to ensure that different cultural sensitivities are taken into account. Commercially, allowing parties to regulate their private interests in accordance to their own conceptions of what is normative will be an incentive to invest. This, after all, is what the common law is trying to facilitate.

CHAPTER 4

Trust and *Waqf* Ownership Structures

The issues of perpetuity and ownership are the main two areas of conflict between *Waqf*s and trusts as traditionally understood. The previous chapter has discussed the areas of conflict and potential avenues for reconciliation with regard to perpetuity in *Waqf*s and trusts. This chapter will deal with the issue of their respective ownership structures, again, pointing out areas of conflict and highlighting reconciliation possibilities. While this issue is pertinent for *Waqf*s and trusts in general (public and private), the focus here is on private family *Waqf*s and trusts.

To set the scene for discussing reconciliation, the groundwork must be cleared first. This chapter will explain ownership theories in Islamic law and common law generally, before delving into the specifics of *Waqf* and trust law ownership theories. After which, the chapter will show that there is scope for reconciliation, especially when theoretical perspectives are neither seen as sacrosanct nor conclusive; theory is seen as a means not an end; a means to achieve more reconciliatory possibilities in the practical realm.

1 Ownership (*Almilkiyah*) in Islamic Law

1.1 *Theological Considerations*

In Islamic law, the discussion of ownership starts in theology.[1] The idea is that Allah is the true owner of everything, while man is only in actual possession (*Milk Ḥaqīqī*).[2] Bambale explains, 'Islam regards the owner of property as one who holds the property on behalf of the community in the capacity of a *trustee*: or a representative and not by his having absolute right of ownership'.[3] He adds, 'absolute or permanent ownership of all things (property included)

1 F Aḥmad, 'Huqūq Almilkiyah bayna Alsharī'ah Al'islāmiyah wa Alqanūn Alwad'ī' in Ja'afar 'Abdulsalām (ed), *Ḥuqūq Al'insān bayna Alsharī'ah Al'islāmiyah wa Alqanūn Alwad'ī*, vol 2nd (1st edn, Naif Arab Academy for Security Science 2001), 885.

2 Ibid. 885.

3 Yahya Bambale, *Acquistion and Transfer of Property in Islamic Law* (Malthouse Press Limited 2007), 4–5.

 | DOI 10.1163/9789004306967_006

belongs to none but Allah'.[4] Jurists have quoted many Quranic verses to illustrate this; examples include but are not limited to:

> Believe in Allah and His Apostle and spend out of what He has made you to be [custodians] of. . . .[5]
>
> And when your Lord said to the angels, I am going to place in the earth a khalif [custodian], they said: What! Wilt Thou place in it such as shall make mischief in it and shed blood, and we celebrate Thy praise and extol Thy holiness? He said: I know what you do not know.[6]
>
> And He it is Who has made you [custodians] in the land and raised some of you above others by (various) grades, that He might try you by what He has given you; surely your Lord is quick to requite (evil), and He is most surely the Forgiving, the Merciful.[7]
>
> Then We made you [custodians] in the land after them so that We may see how you act.[8]

In interpreting the first verse above, Alqurṭubī affirms, 'this proves that the true owner of things is Allah, and it is not for his servant but to use property in what pleases Allah so that he may attain paradise'.[9] Outside Islamic law, Honoré has expounded similar ideas with regard to the state and ownership. He holds that,

> . . . ownership has never been absolute . . . in a loose sense, the state may be said to have an 'eminent domain' over at least the land comprising its territory, this does not carry with it rights to possess, enjoy or alienate it, so that the sense in which the state is owner is very loose indeed. The interest of the state, according to this conception, is confined to powers of expropriation and a minimum of restrictive regulation, together with

4 Ibid.

5 M.H. Shakir, *The Qur'an Translation* (10th edn, Tahirke Tarsile Qur'an 1999), 57: 7. I have underlined the relevant parts of each quoted verse. In all the verses above, Shakir uses the term successors as a translation for *Khalīfah* or *Khalā'if*. The correct translation in my view is 'custodian'. That is what I have adopted.

6 Ibid. 2: 30.

7 Ibid. 6: 15.

8 Ibid. 10: 14.

9 Moḥammad Alqurṭubī, *Aljāmi' Li'aḥkām Alqurān wa Almubayin Lima Taḍammanahu min Alsunnah wa Āy Alfurqān*, vol 20 ('Abdullah Alturkī ed, Mu'assassat Alrisālah 2006), 238 [translation my own].

> the expectancy of acquiring property as *bona vacantia* or by escheat in a few rather remote contingencies.[10]

In reading Islamic literature, one must know when to distinguish theology from law. What Islamic jurists are saying here is theological and not a legal description or depiction of ownership. In reality, no one really owns property forever, as everything and every one has to come to an end at some point. What Islamic jurists mean is that, as Allah owns everything, a Muslim should be mindful of that in his dealings with his property, so as not to transgress the boundaries of Islamic law. It is a moral/religious concept that has at its core the purpose of conforming Muslims to the will of Allah. In any event, as will be demonstrated below, Islamic jurists have also provided legally sophisticated definitions and taxonomies of ownership.

1.2 *Definition of* Almilkiyah

In the Arabic language, *Almilkiyah* is defined as the 'the acquisition of property rights with the exclusive right and monopoly to deal with the property in question'.[11] Legally, *Almilkiyah* has many definitions in Islamic law.[12] F Aḥmad adopted Aljurjāni's definition, which states that ownership is 'a legal connection between a person and a thing that provides him with the exclusive right to enjoy it, and prevents others from enjoying it'.[13] Abu Zuhrah and Alkhafīf give a similar definition, except they both add, 'in a way that does not contravene Sharī'ah',[14] or, in the words of Alzargā, 'in the absence of legal barriers'.[15] Legal barriers include diminished legal capacity and other proprietary rights attaching to property such as liens.[16] Ownership, according to Alzargā, 'is not something tangible, it is a right'.[17] He adds, 'wherever Islamic law acknowledges

10 A.M. Honoré, 'Ownership' in A.G. Guest (ed), *Oxford Essays in Jurisprudence: First Series* (Clarendon 1962), 144–145.

11 Aḥmad 878 [translation my own].

12 Ibid. 879.

13 Ibid., quoting 'Alī Aljurjānī, *Alta'rīfāt* (Ibrāhīm Alabyārī ed, 1st edn, Dār Alkitāb Al'arabī 1405 AH), 295 [translation my own].

14 Moḥammad Abū Zuhrah, *Almilmiyah wa Nathariyat Al'aqd fi Alsharī'ah Alislāmiyah* (Dār Alfikr Al'arabī), 65–66; 'Alī Alkhafīf, *Aḥkām Almu'āmalāt Alshar'iyah* (Dār Alfikr Al'arabī 2008), 42 [translation my own]. See also Bambale 6.

15 Muṣṭafā Alzargā, *Almadkhal Alfiqhi Al'am*, vol 1 (3rd ed, Dār Alqalam 2012), 333 [translation my own].

16 Ibid. 334.

17 Ibid. [translation my own].

a relationship between man and property then it is ownership, otherwise it is not'.[18]

Taxonomically, *Almilkiyah* falls under one of the five necessities (*Alḍarūriyat Alkhams*) protected under Islamic law.[19] The five necessities are: religion (*Aldeen*), life (*Alnafs*), mind (*Al'aql*), property (*Almāl*), and lineage (*Alnasab*, sometimes described as honour, *'Irḍ*).[20] Obviously, ownership falls under property and that is why it is a protected necessity under Islamic law.

For the sake of completion, property, according to Abū Zuhra, 'is a name for things, other than humans, which were created for the benefit of humans'.[21] Alzargā puts it differently; property 'is a material concept that captures things that can generate benefit'.[22] It goes without saying that Islamic law does not accept that everything is permissible as a subject of property.[23] That which is permissible is termed '*Mutaqawim*', something of value, because Islamic law accepts that it has an inherent value.[24] While Abū Zuhrah accepts that property that is not *Mutaqawim* may be property in other legal heritages, it is not property in Islamic law.[25] In other words, ownership rights are not derived from the nature of the things owned; they are derived from the permission of Islamic law.[26] An example of non-*Mutaqawim* property is alcohol or swine. While, under Western legal systems these things may be legally owned, under Islamic law they may not. The practical relevance of this is that in Islamic law destroying property that is not *Mutaqawim* does not give its owner any remedy against the destroyer.[27]

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18 Ibid. [translation my own].

19 Aḥmad 873.

20 Moḥammad Ibn Moḥammad, *Altaqrīr wa Altaḥbīr fī Sharḥ Altaḥrīr*, vol 3 (Mo'asasat Qurṭubah), 144; Badr Aldīn Alzarkashī, *Albaḥr Almuḥīṭ*, vol 8 (Dār Alkutbī 1414 AH), 135.

21 Abū Zuhrah 52 [translation my own].

22 Alzargā, *Almadkhal Alfiqhi Al'am*, 334 [translation my own].

23 Abū Zuhrah 52.

24 Ibid. 53.

25 Ibid.

26 Ibid. 72.

27 Ibid. 53. See, for example, 'Uthmān Alzayla'ī, *Tabyīn Alḥaqā'iq Sharḥ Kanz Aldaqā'iq*, vol 5 (2nd edn, Dār Alkitāb Alislāmī), 221; Moḥammad Albābirtī, *Al'ināyah Sharḥ Alhidāyah*, vol 6 (Dār Alfikr), 405; Mohammad Alramlī, *Nihāyat Almuḥtāj Sharḥ Alminhāj*, vol 3 (Dār Alfikr 1984), 445; *Almawsū'ah Alfiqhiyah*, vol 9 (Ministry of Awqaf and Islamic Affairs, Kuwait), 26. Though, Islamic jurists have made exceptions for non-Muslims living under Islamic law. According to Abū Zuhrah, 'non-*Mutaqawim* property of non-Muslims (such as swine or alcohol) must be respected by Muslims, and they will have remedy rights if such property is damaged'. See Abū Zuhrah 54.

1.3 *Types of* Milkiyah

There are three types of ownership in Islamic law. Firstly, private ownership (*Almilkiyah Alkhāṣṣah*); where a person or a group of persons—as partners—own property.[28] According to F Aḥmad, 'Islam allows private ownership . . . if a person does not get rewarded according to his own actions, he would have no incentive to work harder or more than those who earn the same as him'.[29] The second form of ownership is public (*Almilkiyah Al'āmmah*); where the nation (*Ummah*) collectively owns property, which is used for its collective benefit.[30] An example of this is found in a prophetic tradition. Prophet Mohammad states, 'Muslims are partners in three things: herbage (vegetation used for grazing), water, and fire'.[31] If not owned privately, the Islamic nation or community, not the state, collectively owns these three things. The third form is state ownership (*Milkiyat Bayt Almāl*),[32] such as what the State treasury owns, for example.

1.4 *The Object of* Milkiyah

Ownership is also taxonomically divided according to the object of ownership. First, one may own a thing (*Milk Al'ayn*), such as land or cattle;[33] secondly, one may own usufruct (*Milk Almanfa'ah*), such as rent;[34] thirdly, one may own a debt (*Milk Aldayn*), and fourthly, one may own (or possess) rights (*Milk Alhuqūq*), such as an executor's right over the inherited property of a minor, or the right of first refusal.[35]

Another topic of debate in Islamic law is whether persons can own things, or can merely own their usufruct. So, for example, can a house as a physical entity be owned, or does the owner merely have a right to it, i.e. to live in it, rent it out, and sell it, etc. Some *Mālikīs* believe that the essence of a thing is *never*

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28 Aḥmad 882.

29 Ibid. 891 [translation my own]. See also, Bambale 6. There are various Quranic verses that jurists have used to illustrate the permissibility of private ownership in Islamic law, including 2: 188, 4: 29, 63: 9, 2: 279, 3: 186; 4: 32, 9: 103, and 24: 33. There are also various *Ḥadīths* to evidence this, see Aḥmad 893–894.

30 Aḥmad 882–883.

31 Moḥammad Nāṣir Aldīn Alalbānī, *Ṣaḥīḥ Altarghīb wa Altarhīb* (5th edn, Maktabat Alma'ārif), *Ḥadīth* no. 966. Alalbānī declared this *Ḥadīth* as authentic [translation my own].

32 Aḥmad 883.

33 Ibid. 884.

34 Ibid.

35 Ibid.

owned because the legal use or benefit of things is in their usufruct.[36] So, a house cannot be owned as a physical entity, but one can own the right to use it. Abū Zuhrah believes that things themselves are only owned if that is necessary for their enjoyment; otherwise a person only owns usufruct.[37] So, an apple can be owned in its essence because to enjoy it fully, a person must have the right to consume it. In any event, by his own admission, Abū Zuhrah accepts that this issue is of no practical consequence.[38] But from a theoretical perspective, many of the gaps in *Mālikī* opinion are left unfilled.[39]

However, for our purposes, the idea that a person may own usufruct is a pertinent issue as it illustrates that beneficial ownership is not an alien concept in Islamic legal discourse. Though, this particular debate has not really matured in Islamic law. Important questions surrounding it beg an answer. For instance, if a person may never own a thing itself, or only owns it if it is necessary for its enjoyment, who *does* own things? Perhaps, the question posed should be an alternate one: in what circumstances, if any, might somebody own things in Islamic law? Islamic jurists provide no obvious answers here. Further, the lack of a clear answer is most probably born out of careless theoretical thought that is sometimes a characteristic of Islamic jurists who are more concerned with practical matters. Though, the view that the essence of a thing can rarely be owned is a minority view held by some *Mālikīs* and is not mainstream enough to warrant much more consideration.

1.5 *'Fullness' of* Milkiyah

Another important classification in Islamic law is categorising *Milkiyah* in terms of its 'fullness', to borrow a term from Lupoi.[40] On the one hand, the term encompasses complete ownership (*Milkiyah Tāmmah*): where one owns capital and usufruct together.[41] This gives the owner full ownership rights without limitations (such as commercial, cultural, or personal ones, among others), other than legal limitations.[42] On the other hand, one may own something in a limited way (*Milkiyah Nāqiṣah*): where capital is owned without the usufruct,

36 Abū Zuhrah 72.

37 Ibid.

38 Ibid. 73.

39 For instance, how can enjoying something fully be defined? Also, *who does* own the essence of things? The literature on this issue is scarce, vague and unhelpful.

40 Maurizio Lupoi, *Trusts: A Comparative Study* (Simon Dix tr, Cambridge University Press 2000), 3.

41 Aḥmad 884–885; Abū Zuhrah 74; Alzargā, *Almadkhal Alfiqhi Al'am*, 349.

42 Aḥmad 884–885.

or vice versa.[43] An example of this is where someone gives another the usufruct of his house for life, to revert to his estate after death.[44] One may own usufruct in four instances: as a beneficiary of a *Waqf*, under a will (*Waṣiyah*), as a tenant in a rent agreement (*Ijārah*), and as a borrower (*Āriyah*).[45]

By contrast, owning the object only, without the usufruct, may happen in two scenarios, both involving wills.[46] Abū Zuhara has detailed these scenarios. First, if the owner, in his will, endows a person with the usufruct of an object, regardless of whether the time period has been specified or it is an *in interest for life*, the heirs of the deceased will only own the object and not its usufruct.[47] As Islamic law has forced heirship laws, a testator can only divest a third of his estate outside his forced heirs.[48] If one were to loosely employ common law terminology—acknowledging the dangers that are inherent in explaining the concepts of one legal system by using the terminology of another—the ultimate heirs, under forced heirship laws, are the legal owners,[49] while the testate beneficiary is a beneficial owner.[50] In common law terminology, the testate beneficiary will hold an interest in possession and the heir will have an in interest in remainder.

Second, the testator could give the object of property to one person and its usufruct to another.[51] This, nonetheless, is temporary: if the owner of the usufruct dies first, then the owner of the object also gets the usufruct and vice versa.[52] Islamic jurists have only theorised thus far and have not specified the duties or rights of those who own only the object and not its usufruct. Although, as jurists have not stated that such a person owns the legal title in his capacity as a trustee, one can assume that such an owner has no active duty,

43 Ibid. 885; Abū Zuhrah 75; Alzargā, *Almadkhal Alfiqhi Al'am*, 349.

44 Aḥmad 885.

45 Abū Zuhrah 79.

46 Ibid. 75.

47 Ibid.

48 See Hamid Harasani, 'Islamic Law of Wills: An Overview' (2012) 9 Islamic Finance News 20.

49 It is important to note here that although in this example the heirs are seen as the legal owners, they are not the executors of the deceased's estate.

50 I understand that the legal/beneficial owner dichotomy is also the subject of criticism and debate and I only use the terms here for explanatory purposes. Though, after careful thought, it appears that these terms paint quite a clear picture of the workings of Islamic law in this particular issue.

51 Abū Zuhrah 75.

52 Ibid. 75–76.

other than the duty not to interfere with the beneficiary's enjoyment of the property, and merely plays a passive role until he is endowed with the usufruct.

The discussion above shows that, in theory at least, the essence of the trust—the separation of legal title from use and enjoyment—can be understood in Islamic legal terms as Islamic law understands the concepts of legal and beneficial ownership. This will be elaborated upon later.

1.6 *Modes of Acquisition in Islamic Law*

In Islamic law, there are four main modes of acquisition: attaining permissible things (*Iḥrāz*),[53] work, property transfer measures, such as contracts, gifts, or wills, and succession (*Alkhalafiyah*).[54] For *Iḥrāz*, two conditions must be satisfied: 1) that no one has previously performed *Iḥrāz*, 2) when *Iḥrāz* is being performed, one must have the intention to own.[55] For the comparatist, one can draw comparisons between *Iḥrāz* and Locke's 'Labour theory'.[56] Grey states,

> The labor theory expresses the intuition that the individual owns as a matter of natural right the valued objects he has made or wrested from nature. Thus, the farmer naturally owns the land he has cleared and the crops he has grown; the artisan owns the tools he has fashioned, the raw materials he has gathered, and the products he has made.[57]

Once property is owned, for purposes other than personal use, Islamic law makes it incumbent upon a property owner to grow his wealth.[58]

Most people acquire things through contract. For a contract to pass ownership, the parties need to have legal capacity and free choice.[59] Islamic jurists have made two exceptions to the requirements of legal capacity and free choice. The first is *Aluqūd Aljabriyah* where courts have the power to sell property that is encumbered or that is owned by someone who has become bankrupt.[60] The second is *Istimlāk* where the state takes ownership for the

53 Alzargā, *Almadkhal Alfiqhi Al'am*, 336.

54 Aḥmad 896–897.

55 Alzargā, *Almadkhal Alfiqhi Al'am*, 336.

56 See generally, John Locke, *The Second Treatise of Civil Government and A Letter Concerning Toleration* (Basil Blackwell and Mott Ltd 1948).

57 Thomas C. Grey, 'The Disintegration of Property' in J. Roland Pennock and John W. Chapman (eds), *Nomos XXII: Property* (New York University Press 1980), 77.

58 Aḥmad 897.

59 Alzargā, *Almadkhal Alfiqhi Al'am*, 338.

60 Ibid. 338–339.

public good such as expanding roads, for example.[61] For the sake of completion, Islamic jurists assert that one owns things that are generated from that which is already owned, such as fruits of trees, offspring of cattle, and wool of sheep etc.[62] In discussing common law notions and systems, Honoré states that, 'to justify the institution of ownership', 'some writers' affirm,[63] 'though there are various modes of derivative acquisition, there is only one mode of original acquisition, namely taking possession'.[64] Honoré disagrees with this and believes 'that modes of acquisition, original and derivative, are many and various; one of the functions of expressions such as "he is owner" is precisely to draw similar legal conclusions from varying states of fact'.[65] Honoré, however, does not give examples of other potential modes of original acquisition. In the case of Islamic law, it is clear that jurists have only discussed only one original mode of acquisition, namely *Iḥrāz*. For Honoré's opinion to carry more weight, he should have given another example of another original mode of acquisition. Nevertheless, the importance of Honoré's stance is that it leaves the door open for new possibilities in the future for adopting other original modes of acquisition. In other words, Honoré is not really saying that he knows of more than one original mode of acquisition, although he might do; he is saying that one cannot rule out the possibility of there being others. In that, only time can affirm or refute his position.

1.7 *Characteristics of* Milkiyah *in Islamic Law*

Having established the modes of acquisition in Islamic law, it is worth noting briefly the characteristics of ownership in Islamic law. Alzargā puts forward six characteristics of ownership, four of which are worthy of mention. First, prima facie, ownership brings with it usufruct but sometimes Islamic law allows, in specific instances, ownership of usufruct only.[66] Secondly, the original ownership of a thing, obtained by an original mode of acquisition, is always full ownership in the sense described earlier.[67] Thirdly, the initial standpoint is that the ownership of a thing cannot be temporary, and ownership of a usufruct is

61 Ibid. 339–340.
62 Ibid. 343.
63 Honoré does not specify who these writers are.
64 Honoré 135.
65 Ibid. 136.
66 Alzargā, *Almadkhal Alfiqhi Al'am*, 359.
67 Ibid. 361.

temporary in essence.[68] Fourthly, with the exception of *Waqf*s, ownership of objects cannot be abandoned, waived or abdicated; it can only be transferred.[69]

2 *Waqf* Ownership

2.1 *Classical* Waqf *Ownership Theories*

Once an asset is in a *Waqf*, private ownership of a thing may disappear depending on the school of thought.[70] Some Islamic jurists understand the creation of a *Waqf* to be a charitable waiver of ownership (not a charitable transfer).[71] Alzargā disputes this and believes that a *Waqf* is a transfer of ownership of the object to the charitable purpose and that this purpose has a distinct legal personality.[72] Some Islamic jurists believe that a *Waqf* is comparable to a corporation in law.[73] Alzargā holds that *Istibdāl* (the power, reserved to judges, to replace *Waqf* property when it becomes deficient) is a sign that the charitable purpose 'owns' the *Waqf* property. This, in my view, seems to be a wrong line of reasoning. How can *Istibdāl* be a sign of the charitable purpose's ownership if it cannot be undertaken without the sanction of the courts?[74] Further, using this logic, as courts can sanction *Istibdāl*, can one not argue that courts own the object? Also, how can a purpose own and how can a purpose be a legal personality? Admittedly, these are difficult questions to answer and Alzargā makes broad statements that he does not really justify.

As will be detailed below, the mainstream opinion in Islamic law is that in a *Waqf*, ownership is transferred from the *Wāqif* to the deemed ownership of God.[75] In addition, this opinion does not differentiate between different types of *Waqf*; God owns the property in all types of *Waqf*, whether it is charitable, family, or both. In *Ḥanbalī* jurisprudence, if the *Waqf* is for a specific individual or a closed list of beneficiaries, deemed ownership of the *Waqf* will

68 Ibid. 362.

69 Ibid. 365.

70 Ibid. 361.

71 Ibid. 365.

72 Ibid. 366.

73 Abū Zuhrah 216.

74 I do not dispute here that courts have the power to transfer ownership of things owned by other people. The issue here is that Alzarqā claims that *Istibdāl* is a sign that the charitable purpose owns the *Waqf*. He is using the ownership feature of the power to transfer property to illustrate this, except the only problem here is that the charitable purpose does not possess this feature; the courts possess it.

75 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, vol 4 (Dār Alfikr wa ʿalam Alkutub 1982), 254.

be transferred from the *Wāqif* to the individual or closed list of beneficiaries (*Mawqūf ʿalaymim*).[76] This, however, is not an outright gift. The *Waqf* continues to function and the beneficiaries only have rights with regards to usufruct. The term 'deemed' ownership is used because in law, the beneficiaries' ownership is not documented and the full bundle of rights that comes with ownership is not available to beneficiaries. So, for example, they may not sell or gift the *Waqf* property. Ultimately, this is only a theoretical explanation loosely given by jurists who are more interested in practical matters. In practical matters, and according to the mainstream opinion that renders *Waqf* property perpetually inalienable, it makes no difference to jurists where deemed ownership lies, as the function of the *Waqf* will remain pretty much the same.

Family *Waqfs* are permissible under the *Ḥanbalī* school of thought; though, it appears that *Ḥanbalīs* do not require an ultimate charitable purpose—one that comes into force once the descendants of the *Wāqif* become extinct—to be designated by the *Wāqif*.[77] Once a *Waqf* is created, and the property is settled, it is irrevocable and inalienable.[78]

Some *Ḥanbalīs* hold that the *Mawqūf ʿalyhim* will always own the *Waqf*, even if it is a purely charitable *Waqf*.[79] In his recent work on *Waqf* investments, former Saudi judge Aḥmad Alṣgaih qualifies the *Ḥanbalī* position, 'this ownership is incomplete (*Nāqiṣ*), they do not have both legal and equitable ownership;

76 Ibid.

77 Ibid. 277–292; ʿAli Almirdāwī, *Alʾinṣāf fī Maʾrifat Alrājiḥ min Alkhilāf*, vol 7 (2nd edn, Dar ʿIḥyāʾ Alturāth Alʿarabī), 74–95. The *Shāfiʿī* school of thought also appears to concur with this opinion. On one account in the *Shāfiʿī* School, if the descendants of the *Wāqif* expire, the benefit transfers to the nearest relatives of the *Wāqif* and so forth. Another opinion in the *Shāfiʿī* School holds that upon the expiration of the *Wāqif*'s descendants, the *Waqf* is transformed to a charitable *Waqf* for the poor. See, Aḥmad Ibn Ḥajar Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, vol 6 (Dār ʿiḥyāʾ Alturāth Alʿarabī), 253; Mohammad Alramlī, *Nihāyat Almuḥtāj Sharḥ Alminhāj*, vol 5 (Dār Alfikr 1984), 373–374. The *Mālikī* School also allows family *Waqfs* with no reference to an ultimate charitable purpose, see, Moḥammad Alḥaṭāb, *Mawahib Aljalīl Sharḥ Mukhtaṣar Khalīl*, vol 6 (3rd edn, Dār Alfikr 1992), 22–25. In the *Ḥanafī* School, Abū Ḥanīfah and Moḥammad hold that a *Waqf* is not valid unless the *Wāqif* designates an ultimate perpetual charitable purpose, so that it may exist perpetually. Abū Yūsuf only differs in that he believes one can imply an ultimate perpetual charitable purpose even if the *Wāqif* does not make it explicit. See Ibn Alhumām, *Fatḥ Alqadīr*, vol 6 (Dār Alfikr), 213.

78 Albahūtī, *Kashāf Alqināʿ ʿan Matn Alʾiqnāʿ*, 292; Almirdāwī 100; Aḥmad Alqarāfī, *Althakhīrah*, vol 5 (1st edn, Dār Alkutub Alʾilmīyah 2001), 443.

79 Almirdāwī 38.

the beneficiaries can only enjoy the usufruct and not the capital'.[80] The *Shāfiʿī* school of thought maintains that God will be deemed to own the *Waqf* property in all types of *Waqf*, none else.[81] However, the *Shāfiʿī* School also maintains that beneficiaries of a *Waqf* own its benefit; or, to put it in English legal terms, have equitable ownership.[82] Some jurists, such as Albājī, in the *Mālikī* school of thought hold that *Waqf* ownership remains with the *Wāqif*.[83] Aḥmad Ibn Ḥanbal, the eponym of the *Ḥanbalī* school of thought, is also reported to have held this view.[84] In the *Ḥanafī* School, Abū Yūsuf and Moḥammad hold that a *Waqf* property is in the deemed ownership of God.[85] However, according to Abū Ḥanīfah, a *Wāqif* does not cease to own his property until a judge rules to that effect.[86]

The most important piece of evidence put forward by the *Ḥanbalīs* for their opinion that beneficiaries own the *Waqf* property absolutely is the use of legal analogy with charitable donations (*Ṣadaqah*); for in charitable donations, the donee owns the gifted or settled asset.[87] Opposing scholars, including Alṣgaih, have responded by saying that, following the desire of the *Wāqif*, the *Waqf* is an exceptional form of charity that does not give the beneficiary the capital.[88]

As for the opinion that the *Wāqif* retains ownership of the *Waqf* property, *Mālikīs* use prophetic tradition to back up their opinion. They use the famous *Ḥadīth*, seen as the foundation of *Waqf* law, '*Iḥbis Alaṣl wa Sabbil Althamarah*', which literarily means: 'imprison the capital and liquefy its fruit'.[89] The *Mālikī*s

80 Aḥmad Alṣgaih, *Istithmār Alawqāf* (1st edn, Al-Homaidhi Printing Press 2009), 141 [translation my own].

81 Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 272; Alramlī, *Nihāyat Almuḥtāj Sharḥ Alminhāj*, 388.

82 Alramlī, *Nihāyat Almuḥtāj Sharḥ Alminhāj*, 389; Alhaytamī, *Tuḥfat Almuḥtāj Sharḥ Alminhāj*, 373.

83 Alḥaṭāb 18.

84 Ibn Qudāmah Almaqdisī, *Almughnī*, vol 6 (Maktabat AlQāhirah 1968), 4.

85 Abū Bakr Alkāsānī, *Badāʾiʿ Alṣanāʾiʿ fī Tartīb Alsharāʾiʿ*, vol 6 (2nd edn, Dār Alkutub Alʿilmiyah 1986), 221; Ibn Alhumām 204.

86 Ibn Alhumām 203.

87 Alṣgaih 141–142. See Moḥammad Alkhaṭīb, *Mughnī Almuḥtaj ilā Maʿrifat Maʿānī Alfāth Alminhāj*, vol 3 (1st edn, Dār Alkutub Alʿilmīyah 1994), 522.

88 Alṣgaih 142; Moḥammad Alkubaysī, *Aḥkām Alwaqf fī Alsharīʿah Alislāmīyah*, vol 1 (Maṭbaʿat Alirshād 1977), 214; Moḥammad Abū Zuhrah, *Muḥāḍarāt fī Alwaqf* (Dār Alfikr Alʾarabī), 102.

89 Aḥmad Alnasāʾīī, *Sunan Alnasāʾiī* (Maktab Almaṭbūʿāt Alislāmīah 1994), *Ḥadīth* no. 3604; Moḥammad Alqazwīnī, *Sunan Ibn Mājah* (Almaktabah Alʿilmīyah), *Ḥadīth* no. 2397 [translation my own].

understand this to mean that the ownership of the capital remains with the *Wāqif* himself, since the command is to imprison the capital (i.e. freeze it as it is, in their view).[90] The problem with this is: assuming this opinion is correct, and accepting the fact that the Islamic legal system, as all legal systems, does not view deceased people as owners of property, who would own the *Waqf* property after the *Wāqif* passes away?[91] This is a serious question because the *Mālikī*s also accept that the *Waqf* arrangement does not automatically terminate upon the death of the *Wāqif*, which proves that, after settlement, the *Wāqif* is not a necessary ingredient in the arrangement, this consequently calls to question whether he is the owner after all.

The jurists adopting the majority opinion, that Allah owns *Waqf* property, have used this idea—that *Wāqif*s cannot be owners of *Waqf*s because these are, in most cases, perpetual settlements, and the *Wāqif* is mortal and falls away from the arrangement sooner or later—to support their opinion.[92] Alṣgaih believes that this view is the most protective of *Waqf* property as it prevents the *Wāqif* and beneficiaries from meddling with *Waqf* property under the pretence of holding proprietary rights in it.[93]

2.2 *British Colonial Stance on* Waqf *Ownership*

As this is a comparative study, English law's treatment of *Waqf* ownership provides an important insight. British Colonial cases, especially in India, provide the first modern instances where English judges had to accommodate Shariah principles within the common law framework. In British colonial rule over the Indian subcontinent, British judges, judicially and extra-judicially, viewed *Waqf* property as owned by God, adopting the Islamic majority opinion. In his notes on Muhammadan law, Vesey-Fitzgerald describes the '*corpus*'

90 See Abū Zuhrah, *Muḥāḍarāt fī Alwaqf*, 100; Alkubaysī 215.

91 Islamic law does not have the concept of executors of an estate where the executors hold the deceased's estate on trust until it is distributed. In Saudi Arabia, for example, the deceased's heirs have to apply to court for what is known as *Ḥaṣr Alwarathah* (determination of heirs), where a judge makes a declaration of the rightful heirs and title of all the deceased's property is transferred from him to his rightful heirs collectively. After that, in practice, the heirs themselves are left to divide the deceased's inheritance. Sometimes this leads to dispute and there are occasions where this has led to the powerful taking advantage of the vulnerable. The problem here is not with Islamic law, for in Islamic law this is really a moot point. The onus is on the state to promulgate better administrative procedures for the transfer of wealth from the deceased to his heirs.

92 Alṣgaih 146; Ibn Alhumām 206.

93 Alṣgaih 152–155.

of *Waqf* property as '*extra commercium*', not subject to private ownership or acquisition.[94]

Fyzee states,

> [The law of *Waqf*s is] the most difficult branch [of Islamic law]; the literature on the institution of wakf is vast; there are conflicting decisions; the texts differ amongst themselves widely, and this is not surprising: the social, economic and cultural life of the people in countries such as North Africa, Nigeria, Egypt, Turkey, Arab states, Persia, Central Asia, Pakistan, India and the Far East, differs so widely that such divergences are only to be expected.[95]

The Mussalman Wakf Validating Act 1913 defines a *Waqf* as, 'the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman as religious, pious or charitable'.[96] The Act does not elucidate who would own the property after the 'permanent dedication'. Although accepting that this definition is not comprehensive, the Privy Council has adopted it.[97] Delivering judgment for the Privy Council in *Vidya Varuthi v Balusami Ayyar*, Ameer Ali adopts the majority opinion of Muslim jurists that upon the settlement of property as a *Waqf*, God becomes the owner. He states,

> When once it is declared that a particular proprerty is wakf, or any such expression is used as implies wakf, or the tenor of the document shows . . . that a dedication to pious or charitable purposes is meant, the right of the wakif is exntiguished and the ownership is transferred to the Almighty.[98]

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94 S. Vesey-Fitzgerald, *Analysis of Lectures on Muhammadan Law: To probationers at Oxford for the Tropical Administrative Services of the Colonial Office* (John Thornton & Son), 31. See also, Standism Grove Grady, *A Manual of the Mahommedan Law of Inheritance & Contract* (Delhi Law House 1869), 222; Paras Diwan, *Law of Endowments, Wakfs and Trusts* (Wadhwa & Company 1992), 132–133; S.I. Jafri (ed) *B.R. Verma's Commentaries on Mohammedan Law* (7th edn, Law Publishers (India) Pvt. Ltd. 1997), 703.

95 Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (Tahir Mahmood ed, 5th edn, Oxford University Press 2008), 224.

96 The Mussulman Wakf Validating Act, No. VI of 1913, s. 2.

97 *Ma Mi v Kollander Ammal* (1926) 54 IA 23, quoted by Fyzee 227.

98 *Vidya Varuthi v Balusami Ayyar* (1921) 8 IA 302, quoted by Fyzee 228. See also, *Mohammed Sadik v Mohammed Ali and others* Sel Rep 1, quoted by Ameer Ali, *Mohammedan Law*, vol 1 (4th edn, Calcutta 1912), 194–195; *Shah Wajhuddin v Shah Murtaza* AIR 1930 Oudh 32,

Colonial courts were strict in this understanding. In *Amiruddin v Muzaffar al Hasan*, the court held that a *Waqf* in which the *Wāqif* reserved the power to sell or mortgage the *Waqf* property in her lifetime was void.[99] Generally, Colonial courts were also wary of introducing foreign legal concepts to Islamic law. In *Nawazish Ali Khan v Ali Raza Khan*, though not directly discussing *Waqf* law, the Privy Council criticized the Oudh Chief Court for introducing 'into Muslim law legal terms and conceptions of ownership wholly foreign to the law of Islam'.[100] In sum, with regards to ownership, Colonial courts viewed *Waqf*s in line with the Islamic opinion that held that God was their deemed owner. Furthermore, any attempts to introduce foreign conceptions of ownership to the Islamic law of property were not accepted by the Privy Council.

2.3 *Division of Ownership Theory*

Waqf ownership is neither a clear-cut nor a resolved issue in Islamic law. Very little of *Waqf* law is based on primary source evidence, and, the very little that is, is also contestable in most parts. Consequently, among the various juristic opinions, what is authoritative is subjective and it is certainly more difficult in this area to perceive one opinion as definitively authoritative. Different opinions may be more suited to different times. In their grapples over semantics, academics should not lose sight of the underlying purposes of what they discuss. The more important question is not who owns the *Waqf* but what the *Waqf* as an institution is intended to achieve. In other words, why has the legislator (in this case, God) allowed and even encouraged such arrangements? This is not to say that the question of *Waqf* property ownership is marginal or irrelevant; by contrast, the question is highly relevant.[101] What is being

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quoted by Jafri 704; *Shah Mohd. Kazim v Abi Saghir* AIR 1932 Pat 33, quoted by Jafri 704. This is one fundamental difference between trusts and *Waqf*s. For a more detailed discussion of the differences between trusts and *Waqf*s, see *Muhammad Rustam Ali v Mushtaq Husain* (1920) 47 IA 224; *Zain Yar Jung v Director of Endowments* AIR 1963 SC 985. See also, Faiz Badruddin Tyabji, *Muslim Law: The Personal Law of Muslims in India and Pakistan* (Muhsin Tayyibji ed, 4th edn, N.M. Tripathi Private Limited 1968), 494.

99 *Amiruddin v Muzaffar al Hasan* 45 A 107, quoted by S. Vesey-Fitzgerald, *Muhammadan Law: An Abridgement According to its Various Schools* (Oxford University Press 1931), 215. See also, Ali 226–227.

100 *Nawazish Ali Khan v Ali Raza Khan* AIR 1948 PC 134, quoted by M.H. Beg, 'Gifts, Family Waqfs and Pre-emption under Islamic Law: Some Observations' in Tahir Mahmood (ed), *Islamic Law in Modern India* (N.M. Tripathi Private Ltd 1972), 209.

101 Though, using a functional approach, one could argue that the fact that Islamic jurists did not extensively engage in theories of *Waqf* ownership means that it is a discourse of little value in Islamic law. In response to this, Islamic jurists may not have engaged in

suggested, however, is that this question should be looked at with the *Waqf*'s underlying purpose clearly in sight.

The underlying purpose of *Waqf*s is to utilize property in a way that transcends personal benefit and benefits the community. Fyzee states, '[t]he origin of wakf is to be sought in the strongly marked impulse to charitable deeds which is characteristic of Islam'.[102] Tyabji holds, '[o]ne essential feature of waqf is that it is made with a religious motive—a desire to approach God'.[103] The reality is that this can be done with the three different opinions on *Waqf* ownership discussed above.

Regardless of whether God, the *Wāqif*, or the beneficiaries own the *Waqf* property, it can still be used in a similar manner, achieving identical and communal goals. None of the three opinions inherently inhibits the underlying purpose; it remains to be asked, which opinion, if any, furthers this purpose? While leaving ownership with God insures perpetuity and potentially deters *Wāqif*s and beneficiaries from meddling with *Waqf* property under the pretenses of holding proprietary rights, it has not deterred *Mutawallī*s from embezzling *Waqf* funds.[104] The *Mālikī* and *Ḥanbalī* views respectively—that the *Wāqif*s or the beneficiaries are the owners—are a worry for many Islamic jurists because of the proprietary nature of the rights involved and the strengthened claims to *Waqf* property that this creates. However, Alṣgaih says in the quotation above that the *Ḥanbalī* opinion was best explained as leaving only a beneficial entitlement with the beneficiary. In addition, Islamic property law does recognise the split of legal and equitable entitlements in some instances, as shown above. This means that a fourth possibility may also be developed for the *Waqf*'s ownership structure: divided ownership. Although Alṣgaih alludes to this possibility, he does not adopt it or develop it further. In my research, I have not come across Islamic jurists who hold this view either. However, it is a possibility that Islamic law has the tools to grasp.

There are two main benefits of this fourth possibility. First, it locates ownership in people or companies,[105] who are tangible; whereas locating ownership

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ownership theories extensively but they did engage in it on some level. Moreover, discussions of ownership theories are found in all schools. This illustrates that the discussion is of some merit. In addition, this merit increases when the discussion of *Waqf* law is undertaken in a comparative context, especially if the contrasting model has a different ownership structure.

102 Fyzee 225.

103 Tyabji 495.

104 *Mutawallī* corruption was discussed in chapter 2, pp. 100–106.

105 This will be expanded upon below.

with Allah makes it intangible to us (and the tax authorities), so the property in the eyes of the law would be ownerless. Fyzee believes that 'wakf property belonging to Almighty God' is a 'legal fiction',[106] created to ensure the 'permanency' of the *Waqf*.[107] It would take a matter of faith to see how the *Waqf* structure really operates and, to develop *Waqf* law internationally across various borders and jurisdictions, it is important to explain what a *Waqf* is in legal rhetoric that is accessible to lawyers from all backgrounds. After all, as was discussed above, Muslims view Allah as the owner of all things anyway and this does not prevent them from accepting that humans can also legally own property; *Waqf* property should be no exception.[108]

Second, it can make *Mutawallī*s more accountable because by introducing the idea of legal ownership, more onerous fiduciary duties could also be imposed on them to protect the beneficiaries.[109] This is justified, as, contrary to the situation in which the *Mutawallī* is seen as a mere administrator, he would now be seen as an owner in the eyes of the world. This ownership has to be accompanied by stringent fiduciary duties, as well as strict and enforceable fiduciary laws, to make sure that an already corrupt vocation does not become even more so.[110]

To mitigate the prospect of making *Mutawallī*s legal owners, which might not be well received by *Waqf* law specialists, or people outside the common law heritage in general, Private Trust Companies (PTCs) could also be introduced for *Waqf*s. While PTCs could theoretically be used to hold and manage

106 Fyzee 226.

107 Ibid. 228.

108 There is no recognised line of division between law and theology in Islamic law. Although theology and law are studied as two sub-disciplines, discussions of one sub-discipline usually involve discussion of the other.

109 Some fiduciary duties are already imposed on *Mutawallī*s in Islamic law. See, for example, 'Abduljalīl 'Ashūb, *Kitāb Alwaqf* ('Abdullah Mazzī ed, 1st edn, Almaktabah Almakiyah 2009), 200–230; *Almawsū'ah Alfiqhiyah*, vol 36 (Ministry of Awqaf and Islamic Affairs, Kuwait), 102–103; Ibn Nujaym, *Albaḥr Alrā'iq Sharḥ Kanz Aldaqā'iq*, vol 5 (2nd edn, Dār Alkitāb Alislāmī), 254–260. The point here is that by placing legal ownership with *Mutawallī*s, more onerous duties should be imposed with more stringent regulation. Admittedly, the problem does not really lie in the content of fiduciary duties; it is in their application.

110 Admittedly, my approach to this particular issue has been a micro approach. I do accept that, in reality, the issue is not as straightforward. After all, for strong fiduciary control, one needs strong legal systems with low levels of corruption. In a lot of Islamic countries, that is not the case. However, my treatment of this issue is theoretical and academic. It is meant to show what is possible so that when the time is right, the possible may be realised.

public or charitable trusts, the idea here is to use them for private or family *Waqf*s. It is possible to set up Private *Waqf* Companies (PWCs) that operate in exactly the same way as PTCs. McKenzie defines a PTC 'as a company which is incorporated with its main function being to act as the trustee of a specific trust or a number of "related" trusts'.[111] Essentially, where a PTC is involved, it is the PTC, not the trustees, that legally owns the trust property. PTCs are less regulated, and McKenzie believes that individuals are less and less willing to take up trusteeship nowadays.[112] An advantage is that it can exist in perpetuity and there will be no need continually to replace trustees, or *Mutawallī*s, although the directors of a PTC will have to be continually replaced.[113] McKenzie notes that Middle Eastern settlors are reluctant 'to give up control over underlying assets',[114] and lists six main advantages in having a PTC,

> [1] Greater degree of control over the trustee's decisions . . . [2] much more readily understood by non-professionals . . . [3] trustees' charges may be lower . . . [4] [As it would be a limited liability company it would not 'need to adopt such a cautious approach when administering the trust as would a financial institution . . . [5] confidentiality can be preserved . . . [6] the 'family philosophy' can be maintained in running the underlying business.[115]

Even more importantly, according to Stone, 'private trust companies allow wealthy families to create a wholly bespoke structure within which to manage and develop family wealth in accordance with Shari'a principles'.[116] Although his discussion is of Muslim clients creating trusts and, bearing in mind the heterogeneous opinions by the different Islamic schools of thought, Stone's argument also holds true for *Waqf*s. He states, 'there are different interpretations of what constitute Islamic principles within the different schools and branches of Islam . . . The bespoke nature of the private trust company is therefore an attractive solution'.[117]

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111 Christopher McKenzie, 'Private Trust Companies: The Best of all Worlds' (2008) 14 Trusts and Trustees 99, 99.

112 Ibid. 100.

113 Ibid. 101.

114 Ibid.

115 Ibid. 102–103.

116 Edward Stone, 'Private Trust Companies—Oases for Wealth Planning' (2009) 15 Trusts and Trustees 802, 805.

117 Ibid.

The disadvantage of a PTC is that there is an increased risk that it might lead to the trust arrangement being viewed as a sham trust 'if the terms of the trust are ignored and . . . the trust is treated as the settlor's "personal money box" '.[118] However, if these circumstances were present in a trust arrangement where there was a regular individual trustee, they would also increase the risk of the courts viewing the arrangement as sham. The point here is that it is the circumstances, not the structuring, of the trust that elevates the risk of being rendered a sham agreement, although, undeniably, some structures are more amenable to unscrupulous arrangements than others.[119]

In brief, if the division of ownership were introduced into *Waqf* law, a PWC would mitigate the idea of *Mutawallī*s holding the legal title to *Waqf*s. Moreover, for PWCs to exist, companies that are willing to provide this service must also exist.[120] Competition between such companies will increase standards and ultimately lead to *Waqf*s being run more efficiently, especially if stricter fiduciary laws are enforced. Further, beneficiaries also have their rights recognised; they become beneficial owners, a novel depiction in *Waqf* law but by no means something unknown or not understood in Islamic law.

3 Ownership in Common Law

The previous sections have discussed ownership in Islamic law in general and *Waqf* ownership structures in particular, briefly taking into account how British Colonial courts viewed *Waqf* ownership. It is now time to review ownership in common law and trust ownership theories.[121] The review of *Waqf* and trust ownership theories provides a better platform to compare the two systems and this, in turn, should lead to more fruitful reconciliatory proposals.

Before delving into the discussion of ownership, one must first understand that property, the object of ownership, is in itself a complicated concept. Blackstone famously describes property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in

118 McKenzie 108.

119 For more on PTCs, their advantages and disadvantages, see Bonnie Steiner, 'Private Trust Companies: A Double Edged Sword?' (2009) 15 Trusts and Trustees 458.

120 Though, in the case of *Waqf*s, where *Mutawallī* embezzlement has been commonplace, stricter regulatory measures must be put in place for PWCs.

121 The use of the plural 'theories' is deliberate, as similarly to *Waqf*s, there is a multiplicity of theories that describe the trust's ownership structure. This will be discussed in detail below.

total exclusion of the right of any other individual in the universe'.[122] Alexander and Peñalver have described property as 'a daunting', 'incomprehensible', and 'inaccessibly abstract' topic but also one that raises 'passions, at both personal and political levels, like few other topics can'.[123] Kevin Gray states, 'the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept—oddly enough rather like thin air'.[124] This characteristic is also what makes the concept of property 'flexible and malleable'.[125]

Though, according to Penner, 'we cannot "flexibly" apply property to anything we choose without leading ourselves into confusion about the reasons why we have the concept in the first place, and misunderstanding its usefulness to us'.[126] Further, not everything of value that someone possesses is property. According to Gray, '[t]he decision to leave a resource outside the regime [of property] is, pretty clearly, a fundamental precursor to all property discourse'. ' "Property," ' Gray adds, 'is not a value-neutral phenomenon'.[127] Although they are valuable, things that are ours without any contingency, such as our eyesight or our personalities, are not property.[128] A reason for this, in the words of Penner, is that 'one cannot conceive of how such rights could be separated from a person'.[129]

3.1 *Definition of Property*

'Property is a bore', says Penner.[130] Defining property is 'a very challenging task'.[131] Edelman says, 'the word "property" is like the word "love". It is often used in a number of different senses'.[132] Murphy et al. state, ' "property" has no

122 Quoted by Grey 73.

123 Gregory S. Alexander and Eduardo M. Peñalver, *An Introduction to Property Theory* (Cambridge University Press 2012), xi & 1.

124 Kevin Gray, 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252, 252.

125 Barry Hoffmaster, 'Between the Sacred and the Profane: Bodies, Property, and Patents in the Moore Case' (1992) 7 Intellectual Property Journal 115, 128–130, quoted by J.E. Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA Law Review 711, 723. See also Honoré 130.

126 Penner, 'The "Bundle of Rights" Picture of Property', 799.

127 Gray, 'Property in Thin Air', 297. See *New Jersey v Shack* 277 A 2D 269 (1971).

128 Penner, 'The "Bundle of Rights" Picture of Property', 803.

129 Ibid. 804.

130 J.E. Penner, *The Idea of Property Law* (Oxford University Press 1997), 1.

131 Alexander and Peñalver, *An Introduction to Property Theory* 1; Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988), 26.

132 James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 Law Quarterly Review 66, 74.

single, simple meaning for English lawyers if and when they care to examine the concepts which they use . . . lawyers' conceptualisations of property grow out of the nature of lawyers' diverse involvements in the relation between people and thing" '.[133] In fact, some have suggested that 'we could easily do without using "property" at all'.[134] Kohler responds, 'whilst there are obvious dangers in defining a term so broadly that it ceases to be of any value absent words of limitation, it is simply wrong to assert that we have, as yet, reached that point in respect of *property*'.[135] He adds that the term 'property still has an important role 'in sign-posting what is (and what is not) regarded as a resource'.[136] Kohler also believes that some academics are making the term property support a 'moral or political burden that it cannot bear'.[137] He explains,

> Property is no more than a normative set of relationships which might be attached to whatever subject matter society deems it necessary or beneficial to make the subject of property . . . Those who seek to offer a definition that goes beyond this are simply attempting to make property support a philosophical, moral or political burden that it cannot bear.[138]

According to Waldron, property is difficult to define because private property 'is not only a simple relation between a person and a thing . . . It involves a complex bundle of relations, which differ considerably in their character and effect'.[139] Another problem is that, in the realm of property, specialists and lay people understand the concept differently. Alexander and Peñalver have summarised the difference between lay people and specialists' conception of property,

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133 Tim Murphy, Simon Roberts and Tatiana Flessas (eds), *Understanding Property Law* (4th edn, Sweet & Maxwell 2004), 39.

134 Alexander and Peñalver, *An Introduction to Property Theory*, 2; Grey 72–73; Waldron, *The Right to Private Property*, 52.

135 Paul Kohler, 'The Death of Ownership and the Demise of Property' (2000) 53 Current Legal Problems 237, 241. He also adds, '[i]t does not follow from this that the term is redundant, although it might on occasion be better to employ a specialized form of property term such as pledge, mortgage or bailment; as property lawyers have done down the centuries'.

136 Ibid. 242.

137 Ibid.

138 Ibid. 242–243 & 258.

139 Waldron, *The Right to Private Property*, 28.

> Lay people tend to think of property as a relatively uncomplicated relationship between a person (the owner) and a thing (the owned property). Because of the specific context in which they interact with property law questions, however, lawyers have a tendency to think of property differently. They usually view it as the collection of the individual rights people have as against one another with respect to owned resources.[140]

Cynically, speaking about the specialists' understanding, Grey states,

> we no longer have any coherent concept of property encompassing both simple thing-ownership, on the one hand, and the variety of legal entitlements that are generally called property rights on the other. If correct, this argument means that the forceful intuitions behind the moral arguments for simple thing-ownership can no longer be as readily transferred to the legal institutions of the capitalist economy, as they could when private property was a clearly comprehended unitary concept.[141]

Kohler responds to Grey by stating that it is 'not sufficient . . . to argue that because the term "ownership" is more complex that it might at first appear this necessarily leads to the term's devaluation'.[142] Kohler adds that it is not that property rights 'do not really exist', it is that 'their intangible quality makes them difficult to see'.[143]

Worthington defines property as the 'relationship between an individual and a thing'.[144] According to her, 'transferability and excludability are the important markers of property'; they denote 'that an individual's relationship

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140 Alexander and Peñalver, *An Introduction to Property Theory*, 2; Waldron, *The Right to Private Property*, 52, '[w]e can also see now why ownership appears practically dispensable from the point of view of the technical lawyer. Since he is concerned (most of the time) with the law as it is in the society in which he and his clients, and not with the law as it might be or as it is anywhere else, he never has occasion to raise his attention above the level of the particular conception of ownership constituted by the property rules of the legal system he is dealing with. For his purposes, that conception can be described exhaustively in terms which make no reference to ownership, nor even to the fact that it is a conception of ownership'. See also, Grey 69, '[i]n the English-speaking countries today, the conception of property held by the specialist (the lawyer of economist) is quite different from that held by the ordinary person'.

141 Grey 78.

142 Kohler 239.

143 Ibid. 243.

144 Sarah Worthington, *Equity* (2nd edn, Oxford University Press 2006), 52.

with the thing is "proprietary"'.[145] Penner states, 'Property is a normative relation between an individual, or co-owners, and others which has as its focus and justification the exclusive determination of the uses to which a thing may be put'.[146] Put simply, 'property is what the average citizen, free of the entanglements of legal philosophy, thinks it is: the right to a thing'.[147]

Finally, though, in *Re Earnshaw-Wall*, Chitty J holds that '[t]he expression "property" is not a term of ancient art'.[148] In English law, it is generally understood that property can mean one of three things: 'a tangible thing owned by a person', 'rights in a tangible thing', and 'rights in nothing tangible at all' such as debts or intellectual property.[149]

3.2 *Property Rights and Personal Rights*

Like property, rights in general 'are a matter of society's choice . . . the law could insist on present giving; it could lock up unloving mothers'.[150] In common law, 'the requirements for a right to be regarded as a property right are less rigorous and conceptual than they are in civilian systems'.[151] Kevin Gray states,

> the quest for the essential nature of "property" has beguiled thinkers for many centuries. The essence of "property" is indeed elusive. That is why, in a sense, we have tried to catch the concept by surprise by asking not "What is property" but rather "What is not property?".[152]

Gray believes that property is 'about the control over access'.[153] It is 'the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefit of particular resources'.[154]

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145 Ibid.

146 Penner, 'The "Bundle of Rights" Picture of Property', 801.

147 Penner, *The Idea of Property Law*, 2–3.

148 *Re Earnshaw-Wall* [1894] 3 Ch 156, 157.

149 Paul Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in Lionel Smith (ed), *The Worlds of the Trust* (Cambridge University press 2013), 314. See *Re Earnshaw-Wall*, 157.

150 Worthington 23.

151 Paul Matthews, 'From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust' in D.J. Hayton (ed), *Extending the Boundaries of Trust and Similar Ring-fenced Funds* (Kluwer Law International 2002), 209.

152 Gray, 'Property in Thin Air', 292.

153 Ibid. 294.

154 Ibid.

Matthews asserts that there is not much case law explaining the distinction between property and personal rights.[155] However, Lord Wilberforce has indicated the characteristics that a right must have before it can be categorised as a property right. In *National Provincial Bank v Ainsworth*, he states, '[b]efore a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'.[156] But the problem is that these characteristics can also be true of a personal right. Lord Wilberforce's formulation is only the first step to determining a property right but it is not a useful distinguishing benchmark.

The main distinction between property rights and personal rights is that while the former are good against the world, the latter are only so against persons who have undertaken an obligation to respect them. Matthews states, '[a] property right is a right in relation to a thing—including an imaginary thing such as a debt, a share or a patent (all legal constructs)—and is binding, not only on the person creating it, but on third parties as well. Otherwise it is a personal right'.[157] This is the most characteristic feature: if the right does not bind the whole world, then it is personal. Unfortunately, as Matthews has stated above, this feature is not really affirmed, nor denied; it must be added, by case law.[158] In other words, this fundamental difference between personal and property rights, where personal rights are rights against a specific person or persons and property rights are rights against the whole world, finds basis in scholarly commentary rather than in case law. Until case law affirms this

155 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 315. For rare cases that do so, see *National Provincial Bank v Ainsworth* [1965] AC 1175; *R v Toohey, ex p Meneling Station Pty Ltd* (1982) 158 CLR 327.

156 *National Provincial Bank v Ainsworth*, 1247–1248.

157 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 315.

158 Note that *De Mattos v Gibson* (1858) 4 De G & J 276, 45 ER 108 is an example of a case where the line between property and personal rights was unclear. In *De Mattos*, p. 282, Knight Bruce LJ states, 'Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller'. *De Mattos* is about the equitable discretion allowing the court to replace the common-law rule to prevent unconscionable conduct. Judges themselves cross the line but they do it to prevent unconscionable conduct.

viewpoint, one cannot say, with a high degree of certainty, that this is how the law views personal and property rights.

3.3 *Ownership*

Citing works such as Honoré's and Penner's among others, Katz believes that 'legal scholars have been sceptical about the coherence of the idea of "ownership"'.[159] According to Kohler, lately, ownership has received 'bad press'.[160] He explains, 'rather than question the moral or philosophical basis of the concept, contemporary critics have (perhaps in the spirit of the age) concentrated rather on deconstructing the model and musing on what, if anything, is really there'.[161]

According to Honoré, ownership is 'the *greatest possible interest in a thing which a mature system of law recognizes*'.[162] Honoré explains what it means to own,

> To own is transitive; the object of ownership is always spoken of as a 'thing' in the legal sense, a *res*. There is, clearly, a close connexion between the idea of ownership and the idea of things owned, as is shown by the use of words such as 'property' to designate both.[163]

All legal systems recognise some form of ownership. Indeed, even 'primitive systems', such as the Trobriand Islands' system studied by Malinowski for example,[164] recognise the concept of ownership in some form.[165] There are common features of ownership across all legal systems: '[o]wnership, *dominium, propriete, Eigentum* and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common

159 Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 University of Toronto Law Journal 275, 275.

160 Kohler 237.

161 Ibid.

162 Honoré 108. Cf Kohler 257, "ownership" is more than simply legal shorthand for the greatest possible interest that can exist in personal (and arguably real) property. The term has a variety of other roles . . . It appears in both legal and non-legal discourse as a paradigm signifying absolute power to provide perspective when considering the restrictions which, in practice, establish the actual ambit of "ownership". And it is used in everyday language to signify the one (or many) whose decision as to what should or should not be done with a thing is regarded as "socially conclusive".

163 Honoré 128.

164 Bronislaw Malinowski, *Crime and Custom in Savage Society* (Helix Books 1985), 18–20.

165 Honoré 108.

features transcending particular systems'.[166] Honoré's work focuses on discerning what these common features are, or what he terms as 'standard incidents of ownership'.[167] The consequence of his work is that if a legal system does not recognise the 'standard incidents of ownership' then it does not have a liberal concept of ownership'.[168] For a full explanation of Honoré's eleven standard incidents of ownership, one would have to consult his seminal paper; for our purposes, however, we will make do with simply listing the standard incidents. In the words of Honoré,

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity: this makes eleven leading incidents.[169]

According to Waldron, Honoré's standard incidents of ownership are 'intended more as an elucidation of certain rather common features of ownership along the lines of a Wittgensteinian 'family resemblance' analysis'.[170] Penner believes that Honoré's work 'was widely recognized as providing that which gave the bundle of rights thesis the substance it required'.[171] However, one must be careful with Penner's depiction of Honoré's work in this way, as Honoré himself seemed staunchly against the bundle of rights approach.[172] He believed that 'the thing owned should always be spoken of as a right' because if we substitute owning a thing with owing rights in it, 'it would seem to follow the owner should correctly be said to have certain rights in certain rights in a . . . [thing]; but why stop at the second order of rights?'[173] The answer to this is: while Honoré's observation that the bundle of rights theory is sequential may be true, we stop at the second order of rights because it is there that ownership is located, whereas in subsequent orders of rights, no ownership will be found. To put it differently, the first order of things is ownership of the thing itself (that is where Honoré believes ownership lies) and the second order is ownership of

166 Ibid.
167 Ibid. 109.
168 Ibid. 112.
169 Ibid. 113.
170 Waldron, *The Right to Private Property*, 49.
171 Penner, 'The "Bundle of Rights" Picture of Property', 731.
172 The bundle of rights theory will be discussed separately in the next section.
173 Honoré 133–134.

rights in a thing. Honoré questions why one stops at the second order and not, say, at the third order, having rights to the rights in a thing, or the fourth order, etc. The answer is that we stop at the second order since ownership is found in the second order of things precisely because of the nature of the right owned: a property right.

With respect to the concept of ownership, Waldron states,

> [Ownership] expresses the abstract idea of an object being correlated with the name of some individual, in relation to a rule which says that society will uphold that individual's decision as final when there is any dispute about how the object should be used. The owner of an object is the person who has been put in that privileged position.[174]

Property means two things, 'the thing owned and the relation of ownership'.[175] Christman believes that although 'it is a mistake to see property as the ownership of a *thing* at all';[176] it is also inaccurate to understand ownership as owning rights. He explains,

> Many of the things that are ownable are not tangible objects but abstractions . . . Some writers draw the conclusion that since the entities of ownership are often abstract, the true object of ownership is not a tangible item at all but the *rights* that one has over the things: one simply owns rights (and liberties and powers and such) over goods, not literally the goods themselves. This clarification, however, should be resisted, as it introduces a useless redundancy: owning rights means having (a certain bundle of) rights to rights over or in some relation to some "thing".[177]

He then defines ownership as a relation that 'can be characterized as whatever combination of rights society recognizes that gives individuals primary control over, and/or claims to the income from, tangible things'.[178]

174 Waldron, *The Right to Private Property*, 47.

175 John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (Oxford University Press 1994), 16.

176 Ibid.

177 Ibid.

178 Ibid. 26.

3.4 *Bundle of Rights Theory*

Sometimes referred to as a '[b]undle of sticks',[179] the bundle of rights approach is the prevailing theory in American property jurisprudence, according to Schroeder.[180] The idea here is that one does not own a thing but a bundle of rights in relation to a thing. Writing in the 1980s, Grey favoured this theory and asserted that there was 'a basic need to teach lawyers' the bundle of rights approach.[181] However, Alexander and Peñalver believe that this approach sometimes gets in the way of understanding the concept of property.[182] Heller explains why,

> [W]hile the modern bundle-of-legal-relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the "thingness" of private property . . . As long as theorists and the Court rely on the bundle-of-legal-relations metaphor, they need some analytical tool to distinguish things from fragments, bundles from rights, and private from nonprivate [sic] property.[183]

To remedy this problem, some have sought to distinguish, from the bundle of rights, the single most important feature of ownership. The right to exclude has been the 'most commonly nominated candidate'.[184] Merrill notes,

> [T]he right to exclude others is more than just "one of the most essential" constituents of property—it is the sina qua non. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property.[185]

The only problem with this is that not all property regimes recognise the right to exclude. In Sweden, for example, 'landowners do not enjoy any overriding

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179 Alexander and Peñalver, *An Introduction to Property Theory*, 2. For comment on the theory and policy of the bundle of rights approach, see Grey 78–81.

180 Jeane Schroeder, 'Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property' (1994) 93 Michigan Law Review 239, 239–241; Penner, 'The "Bundle of Rights" Picture of Property', 713–714.

181 Grey 78–81.

182 Alexander and Peñalver, *An Introduction to Property Theory*, 2.

183 Michael A. Heller, 'The Boundaries of Private Property' (1999) 108 Yale Law Journal 1163, 1193, quoted by Alexander and Peñalver, *An Introduction to Property Theory*, 3.

184 Alexander and Peñalver, *An Introduction to Property Theory*, 3.

185 Thomas W. Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730.

right to exclude others from their property'.[186] Alexander and Peñalver suggest that a 'somewhat different definitional approach' be taken, one that looks 'to a specific *function* that property performs'.[187] Jeremy Waldron takes a similar approach; he believes that property is the function of allocating material resources.[188] He believes that '[t]he owner of a resource is simply the individual whose determination as to the use of resource is taken as final in a system of this kind'.[189] He uses an example to clarify this,

> If a particular action, say, riding bicycles, is permitted by law, it does not follow that the law permits me to ride any bicycle I please. The specific function of property rules is to determine, once we have established that bicycles may be ridden, who is entitled to ride which bicycle and when.[190]

According to Penner, the bundle of rights approach is not a theory; it 'represents the absence of one'.[191] He asserts,

> The substantive bundle of rights thesis multiplies elements of property to produce an explanation which is actually inferior to one which regards it as a unified legal relation. While property is complex, it is not complex because it is a "bundle of rights." Lots of rights are just as much this kind of bundle, but we do not thrash about in conceptual confusion because of it.[192]

Penner believes that property is not only about 'the exclusive use of the owner'; it 'also permits him to transfer what he owns'.[193] He, therefore, reaches this definition for the right to property,

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186 Alexander and Peñalver, *An Introduction to Property Theory*, 4. They explain, 'Nonowners enjoy the right to roam where they wish provided they do not interfere with the use the landowner has chosen to make of her land. The Swedish right to roam, known as the *allemansrätt*, is deeply embedded in Swedish culture and is mirrored to varying degrees in other Scandinavian countries. Thus, in Sweden, the owner's privileged position is not created through recognition of a right to exclude in the first instance, but rather by a privileged right to determine the use of the land she owns.'

187 Ibid. 5.

188 Waldron, *The Right to Private Property*, 32.

189 Ibid. 39.

190 Ibid. 33.

191 Penner, 'The "Bundle of Rights" Picture of Property', 714.

192 Ibid. 739.

193 Ibid. 742.

> The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.[194]

The right to property is therefore 'like a gate, not a wall'. This allows the owner of the right to make 'social use' of his property 'via the selective exclusion of others'.[195] Honoré goes a little further than Penner and holds that to exclude others from what one possesses is a natural instinct but it should result in protecting possession and not necessarily bestowing ownership.[196] However, he admits that possession is an 'essential element in ownership'.[197]

4 Trust Ownership

It is important to understand the trust's ownership structure because, according to Cutts, 'until we decide where the trust fits in our law, we will continue to find it very difficult to draw with confidence the limits of its enforceability'.[198] There is 'confusion about basic definitions' in the law of trusts.[199] A reason for this confusion could be because the English system is reactionary.[200] The common law can only typically arise out of a reaction to the cases brought before it. The concern in the English adversarial approach is more about 'establishing possession rather than determining ownership'.[201] Though, as the common law takes an 'anti-conceptual approach to the idea of property',[202] finding

194 Ibid.

195 Ibid. 744.

196 Honoré 114.

197 Ibid.

198 Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6 Journal of Equity 44, 47; Gary Watt, 'Relational Theory and the Trust Concept' (1995) 3 Nottingham Law Journal 56, 56.

199 Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61 Cambridge Law Journal 657, 657.

200 Murphy, Roberts and Flessas 45–46.

201 Kohler 254. Also see Worthington 120, '[a]bsolute justice is unlikely: the law must simply decide who has the stronger claim'.

202 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 313. See also p. 336, '. . . English law, being anti-conceptual, never had a Gaius to lay down in advance a rigid framework for the development of the law. Instead, the law developed on

a conceptual dressing for the law of trusts is a challenging task, and, when explaining it to non-common-law lawyers, Matthews believes that it is best not to 'try to explain all the detail'.[203] Writing in the last decade of the nineteenth century, after surveying the law books for an acceptable definition of trusts, Walter G Hart expresses his disappointment, 'it cannot be said that any of them is entirely satisfactory'.[204] Lepaulle puts it more poetically,

> trusts are the most amazing part of the Anglo-American Law for the Civil Law jurist . . . If he tries to grasp it, he will confront the same disappointing experience as that of the young Prince who runs after a Fairy: when he is on the point of reaching her, she has taken another form, ceases to be a beautiful lady, but has become a white bird, or an old witch![205]

This, however, according to Matthews, is a 'strength' and 'has facilitated the development and the growth of the trust institution'.[206] In addition, according to Hayton, '[t]rust law gives effect to whatever a settlor intends so long as his intentions are certain and workable and not illegal nor contrary to public policy'.[207] Though, it must be added, the settlor's intention to benefit alone is not enough, '[w]hat is needed, regardless of the form of words chosen, is a desire to benefit B by embracing the duties and obligations imposed on trustees'.[208]

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a case-by-case basis, a little like creating a mosaic or a pointillist painting. Thus the structure and the categories of the law appeared afterwards, as a result of the decisions, rather than the other way round'.

203 Ibid. 316.

204 Walter G. Hart, 'What is a Trust?' (1899) 15 Law Quarterly Review 294, 294. Despite being over a century old, this article is well worth consulting as it provides a deep analysis and critique of various definitions of the trust. Especially see pp. 294–298.

205 Pierre Lepaulle, 'An Outsider's View Point of the Nature of Trusts' (1928) 14 Cornell Law Quarterly 52.

206 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 313.

207 David Hayton, 'A Review of Current Trust Law Issues' (2008) 22 Trust Law International 81, 90. See *Burgess v Wheate* (1759) 1 Eden 177, 195; *Citibank v MBIA Assurance* [2007] EWCA Civ 11, 82.

208 Sarah Worthington, 'Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts' [1999] Journal of Business Law 1, 17.

4.1 *Trusts as Obligation*

Academics, such as A.W. Scott and R. Nolan, locate the trust in property, while others, such as Maitland and Hart, locate it in the law of obligations, prompting Honoré to ask whether '*obigatio* [has] . . . swallowed up *res*'?[209] Hart states,

> A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation.[210]

According to Birks, the trustee is under a 'compound obligation . . . to a number of concurrent obligations bound around the first and greatest obligation to preserve and promote the interests of the beneficiary'.[211] Hayton adds that it should not matter whether the burdens attached to the office of trusteeship 'are enforceable by the beneficiaries or by the Attorney-General or the Charity Commissioners or by the designated enforcer'.[212] In defining trusts governed by English law, Hayton makes it clear that he locates trusts in the law of obligations,

> A trust governed by English law would be described as an equitable obligation binding a person ("the trustee") to deal with property owned by him as a trust fund segregated from his private patrimony whether for the benefit of person ("the beneficiaries") of whom he may himself be one, and any one of whom has the right to enforce the obligation, or for the furtherance of a purpose which can be enforced by an enforcer provided for in the terms of the trust or, in the case of charitable purpose trusts, by operation of law.[213]

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209 Honoré 117.

210 Hart 301. See also p. 302, 'it may perhaps be objected that it is not wide enough to cover trusts in which there is no cestui que trust, like a trust for the erection of a monument . . . Such trusts are therefore not trusts in the ordinary sense in which the term is used by lawyers; they may perhaps be called trusts of imperfect obligation'.

211 Peter Birks, 'The Content of Fiduciary Obligation' (2002) 16 Trust Law International 34.

212 David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 Law Quarterly Review 96, 102–103.

213 Ibid. 107. Take note that, according to Maitland, there is no authoritative definition of trusts, see F.W. Maitland, *Equity: A Course of Lectures* (Reissue edn, Cambridge University Press 2011), 43.

Maitland provides a more simplified understanding of what a trust is, '[w]hen a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for the other or for that purpose and he is called a trustee'.[214] Maitland believes that the first trust 'was originally regarded as an obligation'.[215]

In his famous judgment in *Armitage v Nurse*, Lord Millet outlined the essence of the trust. He states,

> There is an irreducible core of obligations owed by the trustees to the beneficiaries . . . The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.[216]

Writing extra-judicially, Lord Nicholls explains, 'to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do no more than formulate, in different words, a trustee's obligation to promote the purpose for which the trust was created'.[217] In the words of Paul Matthews, the irreducible core minimum can be reduced to two obligations: loyalty and honesty.[218] The trustee is under 'a duty not to use the trust res for his own benefit *to the extent that this conflicts with the trust purposes*'.[219]

The obligations approach has also been termed the 'contractarian' approach. Maitland is one of the most famous proponents of this approach. He states,

> We are, as I think, obliged to say that though our definition of contract will include almost every act creating a trust, for historical reasons which still have an important influence on the whole scheme of our existing law, trusts are not brought within all, or even perhaps the larger part, of

214 Maitland 44.

215 Ibid. 111. He elaborates, 'If E enfeoffs T to his (E's) use the substance of the matter clearly seems to be this that T has undertaken, has agreed, to hold the land to the use of E . . . All that the *cestui que use* could have obtained from them would have been an action for damages the Chancellor compelled the feoffee not only to answer any complaint on oath but also to perform his duty specifically on pain of going to prison'.

216 *Armitage v Nurse* [1998] Ch 241, 253.

217 D. Nicholls, 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge' (1995) 9 Trust Law International 71, 75.

218 Professor Paul Matthews said this in his weekly seminar on International and Comparative Trust Law in Dickson Poon School of Law, King's College London on 20 November 2013.

219 Cutts 50. See generally *Re Beatty Hinves v Brooke* [1990] 3 All ER 844; [1990] 1 WLR 1503.

> the great principles which form the Law of Contract, but have rules of their own.[220]

Langbein also believes that '[t]rusts are contracts', accepting, however, that the contractarian analysis does not cover the self-declaration of trust.[221] Langbein asserts that 'consensual formation' and 'party autonomy over the terms' are main features of trust law and are also 'the defining characteristics of the law of contract'.[222] This view has been criticised by Parkinson,

> The traditional trust created by a settlor transferring money or assets gratuitously to trustees is not readily conceptualised within the law of bargains, and nor is the trustee/beneficiary relationship one of mutual benefit conferral where the trustees are unpaid. Furthermore, the settlor who declares himself or herself a trustee makes no contract with anyone.[223]

Matthews highlights four main differences between contracts and trusts. Firstly, while contracts create personal rights, trusts create property rights 'good against the world except a bona fide purchaser for value of a legal estate without notice'.[224] Secondly, a party can terminate a contract for the fundamental breach of the other party; this cannot be done in trusts.[225] Thirdly, 'trusts are subject to the rule against perpetuities' and contracts are not.[226] Fourthly, 'a trust must be for the benefit of people, not for private abstract purposes; on the other hand, contracts can be to promote abstract purposes'.[227]

Academics who believe that trusts are part of the law of property do not deny that trusts have elements of the law of obligations; they must. For example, while Matthews locates trusts within the law of property, he also acknowledges the contractual aspect of trusts that is present in the irreducible core of obligations. Those who locate trusts entirely within the law of obligations, by focusing merely on its obligations aspects, seem to overlook the serious

220 Maitland 111.

221 John H. Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale Law Journal 625, 627.

222 Ibid. 650.

223 Parkinson 681.

224 Paul Matthews, 'The Comparative Importance of the Rule in Saunders v. Vautier' (2006) 122 Law Quarterly Review 266, 288.

225 Ibid.

226 Ibid.

227 Ibid.

property questions that need to be answered. First and foremost, who owns the trust property and what is the nature of the beneficiary's interest? The law of obligations does not provide answers to this question. The obligation approach only looks at the trust's effects between the parties (settlor, trustee, beneficiary). It fails to account for the way in which trusts affect third parties by giving priority to the beneficiary's rights to the assets over those of unsecured creditors, for instance. There is nothing in the law of obligations that explains why one particular kind of claimant should be privileged in this way. That is why this section will proceed under the view that trusts are part of the law of property because, essentially, the questions asked here relate to ownership.

4.2 *The Nature and Content of the Trustee's Obligations*

Undeniably, '[t]rustees play the most fundamental role at the heart of the trust'.[228] Matthews believes that the trustee is 'the owner of the trust assets in the most complete sense possible . . . the trustee's ownership is no less than the ownership of a person who is not a trustee'.[229] Penner also concurs with this view.[230] Further, Matthews dismisses what he terms the 'double idea' theory, 'where the trustee is the legal owner, and the beneficiary is the equitable owner'.[231] For the purposes of the outside world, the trustee is the owner, '[o]nly inside the trust are the powers limited to what is authorized'.[232] Thomas Grey believes that the classical trust ownership conceptualisation, where the trustee is the legal owner and the beneficiary is the equitable owner, is 'meaningless'; 'what is important is that we are able to specify what [trustees, as legal owners, and beneficiaries, as equitable owners] can legally do with respect to the land'.[233] Formally this is true, and it is also true for many other non-trust arrangements. For example, a person may own property via a Special Purpose Vehicle (SPV). In the eyes of the outside world, the SPV is the owner, but is that really the case behind the corporate veil? Formalistic explanations, while helpful on a practical level, are unhelpful on conceptual or theoretical levels where one tries to understand the essence and true nature of things. However, Matthews's approach is reasonable as his audience are

228 Hayton, 'A Review of Current Trust Law Issues', 84.

229 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 316.

230 Penner, *The Idea of Property Law*, 20; J.E. Penner, *The Law of Trusts* (7th edn, Oxford University Press 2010), 15.

231 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 316.

232 Ibid. 317.

233 Grey 70.

primarily lawyers from civilian traditions, to whom he believes it is more confusing to explain things fully than not to explain them at all.[234]

According to some, trusteeship and ownership are not synonymous. In *Morice v Bishop of Durham*, Sir William Grant MR states, 'an uncontrollable power of disposition would be ownership and not trust'.[235] Though, Grant MR does not go further in explaining how ownership and trusteeship differ. Interestingly, Jersey trusts legislation makes it clear that the trustee is not 'the owner in his own right', article 2 of the Trusts (Jersey) Law 1984 provides,

> A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right)—
> (a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;
> (b) for any purpose which is not for the benefit only of the trustee; or
> (c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b).[236]

According to Matthews the phrase 'of which he is not the owner in his own right', is a 'curious one . . . the common lawyer finds it strange, because the whole point about a trustee is that he is the owner in his own right, although admittedly not for his own (exclusive) benefit'.[237] Nonetheless, Jersey law just takes a different approach. Instead of just saying that the trustee is the legal owner outright, Jersey law has chosen to insert the caveat that this ownership is of a different type; an ownership for the benefit of others.

The South African model is also interesting as it recognises two types of trust: 'one where the trustee is owner (classic trust) and one where the beneficiary is owner (*bewind* trust)'.[238] Akkermans explains how the trust works when the beneficiaries are the owners, '[i]n a situation such as *bewind*, where the beneficiary has ownership of the trust property, the trustee will only have personal rights and claims, which would require complex solutions to

234 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 316–317.

235 *Morice v Bishop of Durham* [1803–13] All ER Rep 451, 453.

236 Trusts (Jersey) Law 1984.

237 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 322.

238 Bram Akkermans, 'Review article: D.W. Aertsen, De trust. Beschouwingen over invoering van de trust in het Nederlandse recht' (2005) 9 Electronic Journal of Comparative Law <http://wwwejclorg/92/review92html> accessed 20 September 2012. See Trust Property Control Act 57 of 1988, s.1.

safeguard efficient management of the trust property'.[239] Again, this is a different approach by a different jurisdiction. It illustrates that the trust as a concept is flexible and amenable to different ownership structuring techniques. Nothing should be set in stone here, as long as these different kinds of 'trusts' all achieve the same general purpose, that of managing property in a way that limits the control to the hands of a single or multiple persons or entity. Nevertheless, there must be a point where two trust structures belonging to two different systems are so different that they cannot be included in the same genus. Discerning this point is interesting but it is also outside the scope of this chapter. All that can be said is that with regards to English trusts and Islamic *Waqf*s this point has not been reached.

Conceptually, some scholars believe that when a trust is created, ownership is split into legal and equitable ownership. According to Honoré, 'splitting may serve the purpose of specialization, by separating management from the enjoyment of income and for disposition of the capital; the beneficiary obtains the advantage of expert management of the property but also runs some risk'.[240] According to Worthington, an equitable title can only arise once legal and beneficial interests are 'separated'.[241] As there is no distinct equitable title before the split, 'the legal owner cannot "*retain*" the equitable interest in property and transfer legal title to another'.[242] Worthington believes that the 'transaction has to be effected by full transfer of legal and beneficial ownership to the other who must then re-transfer the equitable interest to the donor'.[243]

This is a problematic analysis because, as conventionally understood, the settlor splits legal and beneficial interests when he settles the trust. According to Worthington, that is not the case. She believes that the settlor transfers full title (legal and beneficial) to the trustee, who then transfers beneficial title to the beneficiary. However, in practice, there is no point at which a trustee is seen transferring beneficial interest to the beneficiary. In other words, there is never an active transfer of beneficial interest by the trustee. Even if there was such a point, Worthington does not define it, or explain how or why it compels the trustee. It is true that, in a trust, equity stains the trustee's conscience and that equity compels the trustee to perform his equitable obligations.[244] But the workings of equity are put into place by the settlor, who desires this equitable

239 Akkermans.

240 Honoré 142.

241 Sarah Worthington, *Personal Property Law: Text and Materials* (Hart Publishing 2000), 47.

242 Ibid.

243 Ibid. See *Commissioner of Stamp Duties (QLD) v. Livingston* [1965] AC 694 (PC), 712.

244 See, for example, *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA).

arrangement that is the trust, not the trustee, upon whom the equitable obligations rest.[245] Put differently, on the one hand, the trustee only has equitable obligations because the settlor desired that through splitting legal and equitable entitlements. On the other hand, if the settlor transfers full ownership to the trustee than this is, at first instance, an outright gift. There are no equitable obligations at this stage simply because an equitable interest has not yet been created.

The question then is: what compels the trustee, who, according to Worthington is an outright owner initially, to create an equitable interest and impose equitable obligations upon himself? The answer is nothing and this cannot be the case. It would be too risky and would make trustee fraud a lot easier. Saying that the trustee is the legal owner, and stopping at that, does not realistically reflect the true workings of a trust. A trust is something different from outright ownership. A trust is a structure whereby A owns property for the benefit of B. Any explanation of trusts that does not take account of B's right (whether it is a persistent right, an equitable interest, or a personal right) does not truly reflect what a trust is.

However, not all academics agree that the trustee is the legal owner of the trust property. Hart, for example, affirms, 'the trustee is not necessarily the legal owner of the trust property'.[246] Unfortunately, this is all Hart has to say on this particular matter and he does not explain his position further. However, one can speculate that what he means it that the trustee's position as to the trust does not necessarily have to be explained by the law of property, it can also be explained through the law of obligations. Nolan entertains the possibility that there might be no single owner in a trust,

> The creation of many and varied interests under a trust may well mean that no particular person (or persons concurrently) can claim to hold the full panoply of rights known as "ownership", if that term is understood to mean a right to exclusive enjoyment of the asset . . . A trust may simply fragment such rights amongst a class of people.[247]

Though it must be said that it is unclear whether Nolan's statement encompasses the whole range of people involved in a trust, including the trustees, or if it only concerns those who hold equitable interests in trust property, namely

245 Admittedly, this does not account for a self-declaration of trust.

246 Hart 299.

247 R.C. Nolan, 'Equitable Property' (2006) 122 Law Quarterly Review 232, 258.

the beneficiaries. If he is speaking about the former, then his statement fits in this discourse. Otherwise, it is more fitting to the discussion of classifying the beneficial interest.[248]

Lawson and Rudden also criticise the idea that trustees are legal owners. They maintain,

> By an unfortunate historical convention, trustees are often called the 'legal owners' . . . they hold the property by the kind of formal title that would be recognized by the common law. To call the trustees 'legal owners' is both inaccurate and misleading. The adjective is wrong since any property (however 'equitable') can be held on trust. The word 'owners' indicates that very often they will have the powers of sale and management that go with ownership. But they are not really owners because they cannot treat the property as their own. They cannot even neglect, let alone destroy, it . . . their own creditors cannot reach the trust property. So it is probably best to think of trusteeship as an office, created by private law.[249]

Gretton goes a little further and holds that trusts do not have to be understood 'within the framework of English law'.[250] 'The trust,' he adds, 'presupposes neither equity nor divided ownership'.[251] Unsatisfied with explaining trusts using the law of obligations, as it fails to explain how a trust can defeat the rights of a legal owner's creditors,[252] Gretton then describes trusts as patrimony, a civil law concept, plus office.[253] Gretton explains what patrimony is,

> The concept of patrimony, or something much the same, is known also to English law, under the name of "estate" . . . In general, the principle is: one person, one patrimony. Everyone has a patrimony, no one has more than one. But the civilian tradition admitted qualifications to this principle. As

248 As the title of his article is 'Equitable Property', it is more likely that his discussion only pertains to those who only hold equitable interests in trusts, i.e. the beneficiaries.

249 F.H. Lawson and Bernard Rudden, *The Law of Property* (3rd edn, Oxford University Press 2002), 86–87. See also, Bernard Rudden, 'Things as Thing and Things as Wealth' 14 Oxford Journal of Legal Studies 81, 82–88.

250 George Gretton, 'Trusts Without Equity' (2000) 49 International and Comparative Law Quarterly 599, 601.

251 Ibid.

252 Ibid. 601–603.

253 Ibid. 617–618.

> well as his ordinary patrimony, a person could sometimes have a "special patrimony." . . . a trust is a special patrimony . . . With the explanation of trust as patrimony everything falls into place. The rights of beneficiaries are personal rights . . . There is no need to resort to duality of ownership.[254]

The problem with Gretton's theory in general is that by trying to justify trusts from a civilian perspective, he also attacks them from such a perspective, so he tries to dismiss divided ownership and the concept of equitable ownership because it lacks the characteristics of legal ownership. He gives nine reasons against characterising the beneficiaries' rights as property rights, or in his words, 'rights *in rem*'.[255] One such example is his second objection, 'if the right of the beneficiary is real, how is it that a person acquiring from the trustee can take free from the rights of the beneficiary?'.[256] His depiction seems to be a confused one; one that treats legal and equitable proprietary interests as one and the same. However, it is already acknowledged in the common law world that they are not; no one is saying that equitable ownership is the same as legal ownership. That has a considerable bearing in understanding the nature of the beneficiary's interest.

After dismissing the idea that the beneficiary's right is a personal one against the trustee,[257] and after also critiquing the theory of the 'partition of rights' (i.e. the legal/equitable ownership idea),[258] Lepaulle advances his own theory. He believes that, although the trustee is 'indispensible for its normal functioning'; he is 'not necessary for the existence of the trust'.[259] According to Lepaulle, 'all that is necessary for the existence of a trust is a *res* and an appropriation of that *res* to some aim'.[260] Lepaulle characterises the trust as 'an appropriation of property, it is a notion thoroughly different from the

254 Ibid. 609–614.

255 Ibid. 605–607.

256 Ibid.

257 Lepaulle 53–54.

258 Ibid. 54, Lepaulle states, 'a trust can not be a partition of the element of individual ownership because if one makes an addition of all the rights of the trustee and those of the *cestui*, the result gives something very different from the notion of ownership . . . It is submitted that if one could take one by one all the rights and duties that the trustee and the *cestui* have, one would realize that each of these rights and duties taken separately could be stricken out without destroying the trusts in its essence'.

259 Ibid. 55.

260 Ibid.

idea of private ownership, but which is, so to speak, on the same level'.[261] He explains,

> Ownership means freedom: even anti-social freedom, it does not involve in itself the idea of effort, of care, of efficiency. But in a village where all property would be held in trust, fields must be well ploughed, carefully cultivated, houses must be kept in good repair, and trees must be pruned. Trusts involve the duty of preservation, of good management, of production: it has a social value by which it opposes itself to ownership.[262]

Lepaulle therefore concludes that common law countries have 'two different regimes for property: individual ownership and trusts'.[263]

Malumián describes what can be termed as the theory of ownerless special purpose patrimony. This is a theory largely influenced by civil lawyers. Simply, this theory holds that the trust property is ownerless, used for specific purposes or to meet particular ends.[264] This, according to those who expound this theory, explains why the trustee cannot use the trust for his own benefit and why 'the trust patrimony is not affected by the bankruptcy of the grantor, the trustee or the beneficiary'.[265] This, in fact, is the position of Québec's Civil Code, section 1261 provides, '[t]he trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right'.[266]

However, not all civil law jurisdictions treat the trust in the same way. South American jurisdictions, for example, accept the idea that the trustee is the owner of the trust property.[267] Malumián puts that down to the idea that there are two categories of ownership, perfect and imperfect.[268] Trust ownership, according to Malumián, is imperfect because 'it is subject to a time limit' and 'subject to the express limitations emerging from the trust instrument and to

261 Ibid. 57–58.

262 Ibid. 58.

263 Ibid.

264 Nicholás Malumián, 'Conceptualization of the Latin American *Fideicomiso*: Is it Actually a Trust?' (2013) 19 Trusts and Trustees 720, 722.

265 Ibid.

266 Civil Code of Québec. See also Guy Fortin, 'How the Province of Quebec Absorbs the Concept of the Trust' (1999) 18 Estates, Trusts & Pensions Journal 285; Gretton 616.

267 Malumián 722–723.

268 Ibid. 724.

the implied limitations emerging from the object of the trust'.[269] The idea of 'imperfect ownership' is not so different from McFarlane's persistent rights theory, which will be discussed below.[270]

4.3 *Classifying the Beneficial Interest*

Should we speak of equitable ownership or equitable interests? It depends. According to Honoré, '[i]f the context is one in which stress is laid on income rights we may be tempted to speak of "equitable ownership" but, if powers of alienation are in question, the holder of the legal estate will alone qualify (if anyone) to be called owner'.[271] Matthews believes that the beneficiary's claim is 'derivative' from, not 'competitive' with, the trustee's right.[272] However, Cutts asks an important question: 'what can the beneficiary do that he was not able to do prior to the creation of the trust; conversely, in what way is the trustee bound to act that he was not previously bound to do?'[273] She explains that 'by creating a trust the settlor confers upon the beneficiary the power to obtain a right'.[274] According to Cutts, the problem with equitable interests is that they demonstrate 'characteristics' of both property and obligation.[275]

A W Scott believes that beneficiary rights are rights *in rem*.[276] Worthington also holds this view, '[e]quitable ownership rights are regarded as proprietary, not personal, simply because they now include rights to transfer to third parties and rights to exclude strangers'.[277] According to Edelman, this view in 'not uncommon'.[278] 'The trustee,' according to Scott, 'is a buffer between the *cestui que trust* and the world; as against the rest of the world he has the rights of an owner . . . but these rights he holds for the benefit of the *cestui que*

269 Ibid.

270 This is supported by Malumián's conclusion. See ibid. 727, 'If it is considered that the trustee has the property of the trust assets in favour of the beneficiary and that such beneficiary has the right to control that the trustee comply with the trust deed, it is crystal clear that the beneficiary has a right that could be coregarded as an especially strong right in personam, a particular right in rem or a brand new third category.'

271 Honoré 142–143.

272 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 318.

273 Cutts 45.

274 Ibid.

275 Ibid.

276 Austin Wakeman Scott, 'The Nature of the Rights of the "Cestui Que Trust" ' (1917) 17 Columbia Law Review 269.

277 Worthington, *Equity*, 67. See also, Worthington, *Personal Property Law: Text and Materials*, 5–6 & 44.

278 Edelman 70.

trust . . . can . . . shift to the trust property and even, in some cases, to the *cestui que trust* himself'.[279] He gives various reasons for his view, most compelling of which is his analysis of the principle that 'equity follows the law',

> This maxim means not that equity treats an equitable interest in property as the law treats an obligation or chose in action, but rather that equity treats an equitable interest in property as the law treats a legal interest in that property. The interest of the cestui que use was held to be assignable even in those early days when to assign a chose in action was illegal on the ground of maintenance . . . But this principle that equity follows the law, that equity applies to equitable interests in property the rules applied by the law to legal interests in the property, has not always been fully accepted or consistently applied.[280]

According to Parkinson, when one places trusts in the law of property, two propositions are 'fundamental'.[281] First, that 'there is a separation of legal and beneficial ownership'.[282] The second proposition is that 'for a trust to exist, there must be trust property'.[283] The first proposition finds support in case law. For example, in *Westdeutsche*, Lord Browne-Wilkinson states,

> Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.[284]

However, the law of trusts does not deem this legal/equitable ownership 'symmetry' necessary as, for example, charitable trusts do not have this 'symmetry'.[285] Criticising the legal/equitable owner dichotomy, Maitland states,

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279 Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 290.

280 Ibid. 271. See *Brown v Fletcher* 235 US 589 (1915), in which the US Supreme Court held that 'the assignment of the interest of the cestui que trust is not the assignment of a chose in action', Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 273.

281 Parkinson 658.

282 Ibid.

283 Ibid.

284 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 705. See also *Twinsectra Ltd. v Yardley* [2002] WLR 802.

285 Parkinson 659.

> one court saying that A is owner, another that X is owner—it would simply have meant anarchy . . . equitable estates and interests are not *jura in rem* . . . it is the more necessary for us to observe that they are essentially *jura in personam*, not rights against the world at large, but rights against certain persons.[286]

In *Re Denley*, Goff J upheld a trust that was arguably a purpose trust, where this 'symmetry' was also lacking.[287] In *Re Denley*, the settlor transferred land to the trustees to be used as a recreation or sports ground for the use of employees of a company and any other people the trustees saw fit. While the class of beneficiaries collectively held the beneficial interest in the land, that class was not closed and in effect the beneficial interest was not symmetrical to the legal interest, it was widely dispersed and too widely diluted. In addition, under a discretionary trust, beneficiaries do not get 'proprietary interests', all they have is a mere hope that the trustee will appoint property to them.[288] However, this cannot be said of beneficiaries of a discretionary trust collectively, where the class is closed and there is no power to accumulate, as in such a case beneficiaries are able to collapse the trust under the doctrine of *Saunders v Vautier*.[289] *Saunders* stands for two things: 'that the beneficiary has the power to collapse the trust, and that the power is unconditional'.[290] In *Re Beckett's Settlement*, Simonds J affirms,

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286 Maitland 107.

287 *Re Denley's Trust Deed* [1969] 1 Ch 373. See Parkinson 661–662. Although some later cases have treated the trust as a discretionary trust, see *Re Grant's Will Trusts* [1979] 3 All ER 359, 368.

288 Parkinson 660. See *Gartside v IRC* [1968] AC 653.

289 *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282. With the exception of the US, the common law world generally follows the rule in *Saunders v Vautier*.

290 Cutts 70. Interestingly, The American legal system accepts the former only. See ibid. 70–71. Initially, the US followed the English approach (see *Elder v Elder* 50 Me 535 (1861); *Culbertson's Appeal* 76 Pa 145 (1874); *Huber v Donaghue* 23 A 495; NJ Ch (1892)). In 1889, in *Claflin v Claflin* 20 NE 454 (Mass, 1889), a Massachusetts court refused to follow *Saunders v Vautier* on very similar facts. This was entrenched by the US Supreme Court in *Shelton v King* 229 US 90; 33 S Ct 686 (1913). § 411(b) of The Uniform Trust Code (2000) provides, 'a non-charitable irrevocable trust may be terminated upon consent of all the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust'. Cutts summarises the main difference between the English and the American approach, '[t]he distinction between the approaches in the two countries is that in American, but not English, law, it is possible for the settlor to impose conditions (such as an age limit) on the exercise of that power. The beneficiaries are therefore not the

> It is quite true that in one sense the objects of a discretionary trust have an interest in the fund which is being administered for their benefit. It is so far true that if the whole of the fund is applicable for their benefit, and they are of full age, they are together entitled to put an end to the discretionary trust.[291]

However, in other cases, such as *Re Baden's Deed Trusts*, the rule in *Saunders v Vautier* will not be practically operable.[292] Commenting on this issue, Parkinson states,

> one might assert as a matter of dogma that the beneficial estate vests collectively in the group of potential beneficiaries even if they could never be ascertained, but it is difficult to see what practical reality this could have . . . If however, the class is so wide that no list of beneficiaries can sensibly be drawn up, then the rule in *Saunders* v. *Vautier* would not apply. Consequently, the legal estate would vest in the trustees without a symmetrical equitable right vested elsewhere, although the trust would need to be set up in such a way as to avoid perpetuity problems.[293]

Parkinson concludes that viewing the trust as a split of legal and equitable ownership is 'incorrect', 'the core idea of the private express trust lies in the notion of equitable obligation in relation to property'.[294] He relies on Kevin Gray who states, '[e]quitable rights of property thus derive from conscientious obligations to deal with an asset or resource in a certain way'.[295]

The second proposition advanced by Parkinson above is that placing trusts in the law of property means that there must be property for a trust to exist. Elaborating on this, Parkinson denies the need for an 'identifiable trust property' for a trust to exist and says, '[i]t is enough that there is identifiable subject-matter within which the trust property may be located'.[296] Parkinson does not deny the need for there to be trust property for a trust to exist, he simply denies

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only persons to whom it is conceptually possible to owe duties'. For the rationale behind *Saunders v Vautier* see Penner, *The Law of Trusts*, 67.

291 *Re Beckett's Settlement* [1940] Ch 279. Also see *Re Smith* [1928] Ch 915.

292 *Re Baden's Deed Trusts* (*No. 2*) [1973] Ch 9. Parkinson 660.

293 Parkinson 660–661.

294 Ibid. 663. See *Commissioner of Stamp Duties* (*QLD*) *v. Livingston*.

295 Kevin Gray, 'Equitable Property' (1994) 47 Current Legal Problems 157, 165, quoted in Parkinson 663.

296 Parkinson 664.

the need for 'identifiable trust property' or a specified trust property. However, it is unclear what he means by 'subject-matter' and whether it is something different from 'subject', as used in the law of trusts, which effectively means trust property. Again, according to Parkinson, the law of obligations does not fall short of being able to explain trusts, '[i]t is enough that the trust *obligation* is defined with sufficient clarity that a court can decide, in the event of dispute, how much money or property is held on trust or should be devoted for the purposes of the trust'.[297] What distinguishes an obligation arising under a trust from any other obligation is that in a trust, 'there must be identifiable subject-matter within which the trust property is located' and to which the equitable obligation attaches.[298]

Parkinson enumerates various advantages of an obligations-based approach to trust law,[299] most important of which is that it 'helps more clearly to answer the question of what is the irreducible core content of the trust idea . . . it is not possible to have a trust without enforceable obligations owed to those who are intended to gain the benefit (in the widest sense) of the property held on trust'.[300]

Langdell also holds an opposing view to Scott's: '[w]hat is called equitable ownership . . . is in truth only a personal claim against the real owner'.[301] In addition, Hayton states, 'it is rather strange for persons within a very extensive fluctuating range of discretionary beneficiaries, like those in *McPhail v. Doulton*, to be regarded as owning equitable interests in the trust property rather than choses in action against the trustee'.[302]

There are three main arguments against Scott's view and for the proposition that the beneficiary has merely a personal right.[303] First, the trustee is the legal owner and 'two persons with adverse interests cannot be owners of the same thing', I shall term this 'the non-duality of ownership argument'.[304]

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297 Ibid.

298 Ibid. 665.

299 Ibid. 676–678.

300 Ibid. 679.

301 C.C. Langdell, *A Brief Survey of Equity Jurisdiction* (2nd edn, The Harvard Law Review Association 1908), 5.

302 Hayton, 'Developing the Obligation Characteristic of the Trust', 102. See *McPhail v. Doulton* [1971] AC 424.

303 Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 275.

304 James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press 1913), 262. Ames goes on to say that 'What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-mater of property as any physical *res* . . . The only way in which the owner of an obligation can realize his

Secondly, 'equity acts upon the person', I shall term this 'the nature of equity argument'.[305] Thirdly, some have argued that the beneficiary's right is personal because the bona fide purchaser for value without notice takes ownership 'clear of the trust'.[306] Langdell maintains, '[i]f equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice'.[307] I shall term this 'the bona fide purchaser argument'.

Scott responds to 'the non-duality of ownership argument' by saying that legal and equitable owners are not owners in the same sense and that the whole concept of an equitable interest was created by equity 'in the evasion of rules of law which imposed burdens or restrictions upon ownership'.[308] Writing about a different topic, Peter Millet states, 'both law and equity seek the same result . . . but do not necessarily draw the line in the same place . . . The apparent similarity of the results achieved . . . is . . . deceptive'.[309] Therefore, legal and

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ownership is by compelling its performance by the obligor. Hence, in the one case, the owner is said to have a right *in rem*, and in the other, a right *in personam*.'

305 Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 277.

306 Ibid. 278.

307 Langdell 6.

308 Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 276.

309 Peter Millet, '*Crabb v Arun District Council*—A Riposte' (1976) 92 Law Quarterly Review 342, 346. See also Andrew Burrows, 'We Do This At Common Law But That In Equity' (2002) 22 Oxford Journal of Legal Studies 1, 2, '[t]o describe a rule or principle as common law was to say that it had its historical roots in the law administered in the common law courts prior to 1873. To describe a rule or principle as equitable was to say that it had its historical roots in the law administered in the Court of Chancery prior to 1873'. There is a whole debate on the fusion of common law and equity. For the view against the idea that the Judicature Acts 1873–75 created a fusion of common law and equity, see R. Meagher, Heydon and Lemming, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (3rd edn, Butterworths Australia 1992), para 221 & 225; K. Barker, 'After Change of Position: Good Faith Exchange in the Modern Law of Restitution' in P. Birks (ed), *Laundering and Tracing* (Oxford University Press 1995), 215. Burrows elucidates what the anti-fusion school believes, '[t]his is not to say that common law or equity is frozen in the position it was in before 1873. Rather common law and equity can independently develop incrementally. But one should not develop the law by reasoning from common law to equity or vice versa'. See Burrows 4. See also Emma Hargreaves, 'The Nature of Beneficiaries' Rights Under Trusts' (2011) 25 Trust Law International 163, 171–172. For the sake of completion, Burrows adheres to the fusion school of thought, see Burrows 4–5. Also see Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1, 9, who believe that their theory of persistent rights sheds new light on the fusion debate, 'This analysis also shows the sterility, in this context at least, of the "fusion debate". On the one hand, the analysis put forward here can be seen as "fusionist": it rejects equitable exceptionalism by insisting that any difference between the two

equitable ownership cannot be perceived through the same prism, one has to be seen through law, while the other has to be seen through equity. Scott responds to 'the nature of equity argument' by claiming that 'equity is not confined to action on the persons' and if it were 'it would not follow that equitable rights are only personal rights'.[310] Finally, regarding 'the bone fide purchaser argument', Scott states,

> It would seem rather that equity being a court of conscience refused to give a remedy unless there was an affirmative reason in point of justice for giving the remedy and that such reason is lacking in a case where both parties are equally innocent. The attitude of the Chancellor is purely negative; he simply leaves the parties where they are; he simply refuses to deprive Peter to pay Paul. The doctrine of the *bona fide* purchase of trust property cannot be explained or understood apart from its history.[311]

McFarlane and Stevens point to another problem with characterising equitable interests as rights *in rem*. A beneficiary 'may have an equitable property right in relation to an intangible asset', for example, 'A can hold a personal right against Z, such as a bank account, on trust for B'.[312] In this case, there is 'no independent physical thing against which B has a right'.[313] Further, McFarlane

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systems cannot be justified by simply pointing to their different historical origins. On the other hand, the analysis put forward here recognises and celebrates the conceptual distinctiveness of equity in inventing the concept of a right against a right'.

310 Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 277, he quotes W.W. Cook, 'The Powers of Courts of Equity' (1915) 15 Columbia Law Review 106, 228.

311 Scott, 'The Nature of the Rights of the "Cestui Que Trust" ', 279.

312 McFarlane and Stevens, 'The Nature of Equitable Property', 3.

313 Ibid. 3. See also Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008), 551, 'the practical importance of Trusts lies precisely in their ability to give B a persistent right against a personal right of A (such as A's bank account; or A's shares in Z Co)'. See Maitland, 50, 'the subject-matter of the trust may not be a true proprietary right, it may not be the legal estate in land of the legal ownership of goods, it may be a mere personal right, the benefit of a contract or debt . . . It not unfrequently happens that you will find one set of trustees standing behind another set . . . the settlor having merely equitable rights can (unless he pays off the mortgage) convey none but equitable rights to his trustees'. See also, Grey 70, 'most property in a modern capitalist economy is intangible . . . we tend to speak of these rights as if they attached to things. Thus we "deposit our money in the bank", as if we were putting a thing in a place; but really we are creating a complex set of abstract claims against an abstract legal institution. We are told that as insurance policy holders we "own a piece of the rock"; but we really have other abstract claims against another abstract institution'.

and Stevens add that even when an equitable interest attaches to a physical thing, its holder does not have a right against that thing.[314] They use the example of conversion to illustrate their point, 'let us say A has title to a car and declares that he or she holds their right to the car on trust for B. If X then steals that car, or carelessly damages it, B has no direct claim against X. X is not liable to B for conversion or for negligently causing damage'.[315] Penner has responded to this by suggesting that the beneficiary can be seen as having an 'indirect' right *in rem*.[316] McFarlane and Stevens reject this as, 'any "indirect" claim depends not on X's interference with the car itself, but rather on X's interference with A's right'.[317] For instance, 'if A consents to X's interference with the car then X's interference, by itself, gives B no direct or indirect claim against X'.[318]

When discussing rights *in rem* and rights *in personam*, Maitland states that the trust does '[n]ot easily' fit 'under either'.[319] Further, Nolan asserts that 'it is a fundamental mistake . . . to treat a beneficiary's rights under a trust as exclusively *in rem* or *in personam*'.[320] He believes that a beneficiary has both proprietary and non-proprietary rights; his negative rights in excluding non-beneficiaries from benefiting from the trusts are proprietary while his positive claims to benefit from the trust funds may or may not be proprietary.[321]

'No-contest' forfeiture clauses could also be used to challenge the notion that beneficiaries are equitable owners, or holders of rights *in rem*, for if they were it would appear that their rights couldn't be forfeited in this way. A 'no-contest' clause 'is inserted in his or her will by a testator to prevent or discourage a beneficiary going to court to contest the will by providing for the beneficiary's interest to be forfeited and pass[ed] to another'.[322] Such clauses

314 McFarlane and Stevens, 'The Nature of Equitable Property', 3.

315 Ibid. 3–4. See *MCC Proceeds v Lehman Brothers International* (*Europe*) [1998] 4 All ER 675; *Leigh & Sullivan v Aliakmon Shipping Co Ltd* (*The Aliakmon*) [1986] AC 885.

316 J.E. Penner, 'The Structure of Property Law (Book Review)' (2009) 17 Restitution Law Review 250, 254.

317 McFarlane and Stevens, 'The Nature of Equitable Property', 4.

318 Ibid.

319 Maitland, 23.

320 Nolan 254.

321 Ibid. 233 & 254–255.

322 Hayton, 'A Review of Current Trust Law Issues', 81. See pp. 81–82 for a general explanation of the operation of 'non-contest' forfeiture clauses.

have been used in wills[323] for centuries and are now also used in trusts.[324] The power the settlor exerts over the beneficiaries by such clauses and his ability to strip them of any entitlement casts doubt over the idea that the beneficiaries have proprietary entitlements in the full sense of the term.

McFarlane and Stevens believe that equity transcends, not duplicates, 'the classical division between rights against things and rights against people'.[325] They affirm that an equitable right is neither a personal right (a right against a person) nor a property right (a right against a thing); it is a 'right against a right', a 'persistent right'.[326] McFarlane asserts that a beneficial right under a trust is a classic embodiment of a persistent right.[327] The 'key attribute' of a 'right against a right' is its 'persistence', 'if B has a right against A's right, B's right is prima facie binding on anyone who acquires a right that derives from A's right'.[328] However, persistent rights do not directly impose 'a prima facie duty on the rest of the world', that is what distinguishes them from property rights.[329] Importantly, McFarlane and Stevens hold that there is no *numerus clausus* for rights against rights.[330] This is because 'B will acquire such a persistent right whenever A is under a duty to hold a specific claim-right or power, in a particular way, for B'.[331] McFarlane has developed separate tests to determine whether rights are property rights or persistent rights:

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323 *Adams v Adams* [1892] 1 Ch 289; *Nathan v Leonard* [2003] 1 WLR 827. See generally Andrew Tettenborn, 'Trust Property and Conversion: An Equitable Confusion' (1996) 55 Cambridge Law Journal 36.

324 *AN v Barclays Private Bank & Trust (Cayman) Limited* [2007] WTLR 565.

325 McFarlane and Stevens, 'The Nature of Equitable Property', 2.

326 Ibid. 1–2. Please note, McFarlane and Stevens accept that not all equitable rights are persistent rights. See ibid. 8, 'Not all equitable rights are rights against other rights. Where B has a mere equity B does not yet have a right against a right; instead, he or she has a power to acquire such a right. For example, if B's transfer of his or her car to A is procured by A's innocent, rather than fraudulent, misrepresentation, B's right to rescind arises in equity rather than at common law. If B elects to rescind, he or she removes the basis on which A acquired B's right to the car'. For a right to be a persistent right, it must have certain characteristics, McFarlane discuss these in ibid. 10–12.

327 McFarlane, *The Structure of Property Law*, 207.

328 McFarlane and Stevens, 'The Nature of Equitable Property', 1.

329 McFarlane, *The Structure of Property Law*, 31.

330 There is no *numerous clausus* with regards to some rights, some mere equities are outside *numerous clausus* but some are replicates of legal entitlements, such as equitable leases.

331 McFarlane and Stevens, 'The Nature of Equitable Property', 1–2.

> **Property right**: **TEST**: Is it on the list of permitted property rights? **EFFECT**: Rest of the world is under a prima facie duty to B. **Persistent right**: **TEST**: Is A under a duty to B in relation to a specific claim right or power held by A? **EFFECT**: B has a power to impose a duty on anyone who acquires a right that depends on A's claim right or power.[332]

McFarlane and Stevens believe their theory makes the idea of equitable property easier to export as 'any legal system can recognise the concept of a right against a right'.[333] While McFarlane and Stevens's theory is a sound one, the claim that it will make equitable property easier to export is not justified and is therefore questionable. To say that it helps export the idea of equitable property to other jurisdictions, it is also necessary to show that other jurisdictions have concepts that are identical or similar to 'persistent rights'; McFarlane and Stevens have not shown that.

While Cutts accepts that McFarlane and Stevens's theory explains 'why an unlimited range of equitable interests may be created',[334] she finds the theory 'highly abstruse', as 'persistent rights' could describe two different relationships: '(a) the relationship between the trustee and trust res, and (b) the relationship between the trustee and the beneficiary'.[335] But this is precisely what a persistent right is designed to do. It is not a personal right between two people, or a property right between a person and property; it is designed to include aspects of both.

Edelman believes that terms such as 'equitable ownership' and 'equitable proprietary right' have made the concept of trust more difficult to grasp and must be 'avoided altogether'.[336] He says that the nature of the beneficiary's equitable right is different from a property right in common law.[337] His views are similar to McFarlane and Stevens's:

> The common law property right is in relation to the *res*, i.e. the land or the chattels themselves. The equitable "property" interest is one step removed. It is an interest which relates to the trustee's *rights* including

332 McFarlane, *The Structure of Property Law*, 218 [emphasis added].
333 McFarlane and Stevens, 'The Nature of Equitable Property', 2.
334 Cutts 47–48.
335 Ibid. 48.
336 Edelman 66.
337 Ibid.

> the trustee's rights to those tangible things as well as to intangible things.[338]

The appeal in Edelman's work lies in its clarity in articulating why the beneficiary is not an equitable owner, or a holder of a right *in rem*. He attributes that to several reasons. First, the fact that the beneficiaries cannot sue tortfeasors 'for torts committed in relation to the trust assets'.[339] This is to avoid double or multiple liability for the tortfeasor, if each set of beneficiaries could sue, especially in a structure that had sub-trusts as well as trusts.[340] Secondly, rules of private international law provide that foreign courts cannot decide on questions of title in relation to foreign land. These rules do not extend to equitable interests, as courts can 'adjudicate on questions of equitable rights under a trust'.[341] Thirdly, as personal rights could also be held on trust, it would be confusing to describe the beneficiary as the equitable owner of the trust assets.[342] This has led Edelman to define the beneficiary's right as 'an interest or encumbrance upon the right held by the trustee'.[343]

Kelvin Low is also of the view that 'a beneficiary's right is more accurately described as rights *against* rights'.[344] It is not 'a competing property right to legal property rights'.[345] Low bases his conclusion on the beneficiary's right to sue; if he is in possession he could sue because he is in possession rather than as a result of his equitable interest.[346] A mere equitable owner cannot sue a third party,[347] unless he joins 'the legal owner as a party to the action' in

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338 Ibid.

339 Ibid. 70.

340 Ibid. See *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1.

341 Edelman 70. See *Penn v Lord Baltimore* (1750) 1 Ves 444.

342 Edelman 70–71.

343 Ibid. 72. See also pp. 72–73.

344 Kelvin Low, 'Equitable Title and Economic Loss' (2010) 126 Law Quarterly Review 507, 508.

345 Ibid. 507. See also McFarlane, *The Structure of Property Law*, 25–32; Lionel Smith, 'Trust and Patrimony' (2008) 38 Revue générale de droit 379.

346 Low 507. See *Healey v Healey* [1915] 1 KB 938.

347 *Rae v Meek* (1889) 14 Ap Cas 558; *Mara v Browne* [1896] 1 Ch 199; *Parker-Tweedale v Dunbar Bank Plc* (*No 1*) [1991] Ch 12, 19; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC); *Bradstock Trustee Services Ltd v Nabarro Nathanson* [1995] 1 WLR 1405; *Young v Murphy* [1996] 1 VR 279 (Court of Appeal of Victoria); *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, 1224; *Hunter v Canary Wharf* [1997] AC 655 (HL); *MCC Proceeds v Lehman Brothers International* (*Europe*); *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch); *Websters v Sandersons Solicitors* (*a firm*) [2009] EWCA Civ 830. This is also true in relation to tort law, see *Leigh & Sullivan v Aliakmon Shipping Co Ltd* (*The Aliakmon*). However, courts have, in rare cases, allowed beneficiaries to bring tortious claims, see *Yudt v Leonard Ross & Craig*

what is known as the *Vandepitte* procedure.[348] In *Chappell v Somers & Blake*, Lord Neuberger holds,

> . . . the fact that it would be the beneficiary who, in practical terms, lost the tax which was paid, and it was the beneficiary who, but for the negligence of the solicitors, would have legally owned the trust property during the period when the loss was incurred, would not alter the fact that the appropriate claimant would be the trustee.[349]

Hargreaves explains the policy reason behind this,

> . . . to provide a direct claim would be to unjustifiably extend excessive protection to beneficiaries at the expense of third parties, who may be subject to endless litigation from parties they were unaware had an interest in the property . . . the unavailability of a direct claim against third parties at common law will not unduly prejudice the beneficiary who already has the direct protection of equitable remedies and the indirect protection of common law remedies brought by, or on behalf of, the trustee.[350]

There are potential exceptions to this general rule and, according to Hargreaves, these exceptions have led some academics to characterise the beneficiary

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[1998] 1 ITELR 531. This case has been criticised, see Hargreaves 168. *Shell UK Ltd and others v Total UK Ltd and others* [2011] QB 86, has allowed a beneficiary to bring a claim a tortious claim for consequential economic loss provided the trustee was joined. Finally, beneficiaries also cannot directly enforce contracts entered into by the trustee with third parties, see *Harmer v Armstrong* [1934] Ch 65, 95; *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 PC; *Chappell v Somers & Blake*. After analysing these cases, Hargreaves concludes, '[f]rom the above analysis we can assert that the general rule applied by the courts, as emphasised by Lord Templeman in *Hayim v Citibank NA*, is that it is the trustee, and the trustee alone, who can bring proceedings in tort or breach of contract in order to protect the estate and enforce any rights that belong to it. Most of the cases where a beneficiary might appear to have had a direct claim in tort are in fact cases where the beneficiary sued on their *possessory* title, rendering the trust relationship wholly irrelevant. Additionally, in the few anomalous cases, like *Shell v Total* and *Yudt*, where courts have allowed direct claims, they have done so without providing convincing justifications for departing from the general rule'. See Hargreaves 171.

348 Low 507. See *Vandepitte v Preferred Accident Insurance Corp of New York*.

349 *Chappell v Somers & Blake*, [28].

350 Hargreaves 183.

rights as proprietary. For example, a beneficiary can sue a third party for knowing receipt if he unconscionably accepts the transfer of trust property from the trustee in breach of trust.[351] Hargreaves rebuts this, '[t]he beneficiary is only able to bring a claim against the third party because, once the third party's conscience has been affected by knowledge of the trustee's breach, equity imposes the duties of a trustee on the third party'.[352] Another potential claim is dishonest assistance. If a third party dishonestly assists the trustee in breaching his trust obligations, then a beneficiary may have a personal claim against him, as the third party would be 'liable as a constructive trustee'.[353]

Crucially and outside of the limited potential exceptions mentioned above, a beneficiary cannot compel 'a legal owner to bring action'.[354] As we have seen, the most distinct feature of ownership is the right to exclude the world, from that which is owned. This right is protected by law and vindicated by the fact that an owner can bring action against all third parties who encroach upon his property. If, however, a right holder cannot bring such an action directly, then the argument is that he is not the true owner, or, to put it boldly, he is not an owner at all.

Another point that must be considered is the issue of the trustee's conscience, which some have tried to use to show that beneficiaries have rights *in rem*. For a trust to rise, the trustee's conscience[355] must be

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351 Ibid.

352 Ibid.

353 Ibid. See, for example, *Barnes v Addy* (1874) L R 9 Ch App 244, 251.

354 Low 507. See *Hayim v Citibank NA* [1987] AC 730 PC. See also, *Parker-Tweedale v Dunbar Bank Plc* (*No 1*), 25, Purchas states, 'the law will not import a duty in tort to enlarge the rights of the beneficiary . . . The rights of a beneficiary have already been recognised and protected under the existing equitable principles dealing with the trust and the rights of the beneficiary against the trustee'.

355 Matthews explains what is meant by conscience, 'The idea of conscience in the context of the trust is based upon the notion that there exists a standard of behaviour which is higher than that required by law, and which more or less conforms to the standard of behaviour of a good Christian in a given situation, bearing in mind the moral precepts of his religion. It therefore pushes up the legal standard to a higher level, which is fixed and not variable . . . In this it rather resembles the way that Islamic and Jewish law deal with the regulation of behaviour beyond what Western systems would regard as the province of the law, i.e., so as to include matters of morality. In my view it is no coincidence that the word for law in both Islamic (sharī'a) and Jewish (halakhah) systems translates as 'the path to follow,' and covers matters of etiquette, everyday behaviour and morality, far beyond the limited Western notion of law. See Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 317, fn 17. Further, the beneficiary can also attack the conscience of a third party, Matthews notes, 'It is also that the beneficiary can

affected,[356] and he therefore has to have 'sufficient awareness of the facts'.[357] Cutts has highlighted the practical complexities of this, '[a]side from the task of determining the requisite type and level of knowledge, identifying the point at which it has been reached in an individual case is difficult, and inevitably leads to uncertainty over when a trust arises'.[358] The fact that the beneficiary can use 'the conscience idea to attack third parties' means that beneficiaries' rights are not *in personam*; they resemble property rights in that 'in practice' they bind third parties.[359] This is the challenge.

However, courts have held that if the trustee disclaims, this does not destroy the beneficiary's interest; rather, title will revest in the settlor on the trust's terms.[360] Cutts believes that there are two possible explanations for this. The first 'is that although acceptance *is* necessary, there is a presumption in favour of it'.[361] Cutts dismisses this, '[i]f acceptance were truly presumed and therefore still necessary for the existence of the trust, disclaimer ought to destroy the interest of the beneficiary. It does not have this effect'.[362] The second and 'better' explanation, according to Cutts, 'is that title passess regardless of acceptance or notice'.[363] Cutts elaborates, '[a] trust *can* arise in the absence of knowledge on the part of the trustee, though he will not be subject to any obligations in respect of the trust res, nor liability for breach in such cases'.[364]

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attack the conscience of a third party who receives the trust assets from the trustee gratuitously or with notice of the trust, and can thus in effect both (i) trace the trust assets, in whatever form they have been converted (a form of real subrogation), into the hands of third parties, and (ii) prevent the private creditors of the trustee from seizing the trust assets in satisfaction of the private debts'. See ibid. 318. See also, Penner, *The Law of Trusts*, 2–4 & 42.

356 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*. See also, *Cool v Fountain* (1767) 3 Swans 585; *Re National Funds Assurance Co*. (1878) 10 Ch D 118; *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174. Cf *Birch v Blagrave* (1755) Amb 264; *Siggers v Evans* (1855) 5 E&B 367; *Childers v Childers* (1857) 1 De G & J 482; *Re Vinogradoff* [1935] WN 68; *Re Muller* [1953] NZLR 879. Lord Browne-Wilkinson distinguished this case from all the others.

357 Cutts 50–51.

358 Ibid. 56. See also Peter Birks, 'Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case' (1996) 4 Restitution Law Review 3, 19–20.

359 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 323.

360 *Mallot v Wilson* [1903] 2 Ch 494, 503, quoted by Cutts 52.

361 Cutts 52. See *Re Birchall* (1899) 40 Ch D 436, Lindley LJ states, 'a man's assent to a devise is presumed unless he disclaims'.

362 Cutts 52.

363 Ibid.

364 Ibid. 57.

One comment could be added to Cutts's theory. *Mallot* illustrates that a beneficiary's right is not derivative, upon the creation of the trust, it arises as of its own right but its exercise is dependent on the presence of a trustee. In the words of Cutts, case law supports the view that a beneficiary's interest 'is an unconditional power to obtain a right, the correlative of which is the trustee's liability to be made subject to a duty to transfer his rights to the beneficiary'.[365]

The question is, though, why do equitable rights resemble proprietary rights? Maitland provides an answer; equitable estates are enforced against the trustee, his heirs, his creditors, any person who comes to the trust assets as a volunteer through the trustee, a purchaser who knows about the trust, and even a purchaser 'who would have known of the trust had they behaved as prudent purchasers behave'.[366] But that is the limit, '[a]gainst a person who acquires a legal right *bone fide*, for value, without notice express or constructive of the existence of the equitable rights those rights are of no avail'.[367] Such a purchaser has 'obtained a legal right' recognised by law, '[o]n what ground of equity are you going to take it from him?'.[368] This person's conscience is 'unaffected' and '[e]quity cannot touch him'.[369] Maitland, therefore, concludes, '[e]quitable estates and interests are rights *in personam* but they have a misleading resemblance to rights *in rem*'.[370]

Finally, McFarlane and Stevens's view, also supported by others such as Edelman, Hargreaves and Low, is the preferred characterization of the beneficiary's entitlement in a trust.[371] Hargreaves's reasoning above is especially persuasive. A beneficial entitlement under a trust resembles proprietary rights in the sense of its exclusivity, although limited, and personal rights in the sense that it is not enforceable against the whole world; however, this neither makes a beneficial entitlement proprietary nor personal. Unable to fit under proprietary or personal rights, McFarlane and Stevens have rightly developed a third, more fitting, label for an equitable or beneficial entitlement: a 'persistent right'. This can also be synthesised with Matthews's idea that an equitable

365 Ibid. See *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98.

366 Maitland 112–114.

367 Ibid. 114.

368 Ibid.

369 Ibid. 115.

370 Ibid. 117.

371 Hargreaves, Edelman and Low do not mention anywhere in their articles, cited above, that they support McFarlane and Stevens. I am unsure whether their comparable views are a coincidence or a collaboration.

entitlement is 'derivative' not 'competitive', it is not a right alongside a right; it is a right against a right; that is why it is derivative.[372]

5 Comparing *Waqf* and Trust Ownership Structures

Depending on the interpretations one chooses to adopt, *Waqf* law and trust law ownership theories can either be almost identical or at odds with each other. It is all a matter of interpretation. Traditionally, trusts are seen as a separation of ownership into legal and equitable ownership, the trustee holding legal ownership and the beneficiary holding equitable ownership. The conventional views are incompatible; in a trust, legal ownership vests in the trustee, while in a *Waqf*, God is the deemed legal owner, a metaphysical concept that necessitates faith to accept. Put differently, in a *Waqf*, legal ownership disappears from the realm of the material world altogether, it no longer exists before our eyes. Conversely, not accepting the idea of legal ownership in English law might make it difficult to accommodate other English theories, which require the concept of legal ownership. For example, how can *Waqf*s be explained using McFarlane and Stevens's 'persistent rights' theory, if there is no proprietary legal entitlement against which one may have rights?[373] Likewise, the conventional Islamic theory is incapable of explaining English trusts.

However, *Waqf* and trust ownership theories are not conclusive; they have both been hotly contested. Islamic law and common law's averseness to theory ironically makes the task of reconciling *Waqf* and trust ideas of ownership easier, in theory at least. Nevertheless, to make progress in comparative legal research, it is sometimes necessary to step away from conventional theoretical viewpoints to ones that are either already there, but not mainstream, or may be introduced with minimal disruption to the indigenous legal system. For instance, it would be difficult to introduce the concept of an equitable owner into a legal system that does not recognise equity or equitable entitlements. Therefore, introducing such a drastic reform would be too upsetting to the receiving legal system and in this case researchers will have to look at the

372 It must be said, however, that this theory has still to find judicial acknowledgment in case law.

373 While theoretically, McFarlane and Stevens's theory may be the most persuasive, it is not practicable for the purpose of reconciling trusts and *Waqf*s, merely because Islamic law does not recognise the concept of persistent rights. As highlighted above, theories are rarely conclusive and, as such, the ones most practically compatible must be advanced for reconciliatory purposes.

previous step first. They must consider how they could transplant the whole idea of equity before they begin to transplant some of its workings.

In the realm of theory, conclusiveness is difficult to reach. When working with theory for practical purposes, not necessarily applied purposes, the ideal is achieving workability, not conclusiveness. After all, conclusiveness in theory is overrated as, in many cases, theory is rarely set in stone and is continually re-formulated over time. The key is working in the snapshot of time that one is in, using theory to achieve a set purpose. This may sound controversial to the purists who are under the sway of the classical philosophical method of seeking universal truths. They may be right but, until they prove those universal truths, we must get on with the task of reconciling comparable but conflicting legal structures, such as *Waqf*s and trusts.

While admittedly a lot of the discussion in this chapter is theoretical, theory in the sphere of trust ownership has practical use. For example, the theoretical depiction of trusts separating ownership into legal and equitable with the trustee being the legal 'real' owner has put off some foreign property owners from creating trusts. O'Hagan cited this as a main reason behind the attractiveness of foundations, '[t]he relative ease with which non-lawyers can understand the corporate nature of a foundation and the absence of the concept of 'separation of title' are generally cited as the main attractions to founders of the foundation over the trust'.[374]

Matthews raises an important point about not being blinded by form when undertaking comparative legal research, substance is more important. He notes, '[w]e should not be blinded by the name given by one system when trying to compare it with another: we should look to the substance rather than to the form'.[375] Matthews here allows for understanding a common law concept in a different way. To adopt a legal structure from a different system, it only has to work similarly, not identically. However, Matthews also believes that law's fundamental values differ from one system to another and that translation and interpretation may sometimes make the problem worse.[376] He provides an example to clarify this,

> One of the most glaring examples . . . concerns the English word 'property' and the French word 'propriété' (Italian proprietà, Spanish propiedad). Whereas in English the word 'property' often signifies some thing

374 Patrick O'Hagan, 'Foundations and Trusts' (2009) 23 Trust Law International 80, 80.

375 Matthews, 'From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust', 213.

376 Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', 313–314.

> which belongs to a person, in French (and Italian and Spanish and so on) the word usually signifies the relation which a person has with the thing.[377]

Malumián states, '[t]he sole fact that a country has a legal scheme that is called 'trust', or whose name could be translated as 'trust', does not mean it is actually a trust'.[378] Additionally, what is or is not a trust varies across legal systems. So while a *Waqf* may not be a valid form of endowment in the eyes of common law, a trust may not be a valid form of endowment in Islamic law. This doesn't have to be true in the case of trusts and *Waqf*s, not if reconcilable ownership structures are promoted.

In addition, the common law is flexible and has an inherent readiness to adopt new ideas. Worthington states, 'the degree of divergence that now exists between different common law countries, despite these common origins, is testament to the inherent flexibility of a precedent-based evolutionary system. If judges are so minded, new ideas can be readily integrated into the regime'.[379] Moreover, writing in an academic setting provides an added advantage: unlike judges, academics do not have to wait for a legal problem to be litigated before they engage with it.

Furthermore, the concept of party autonomy is at the heart of the common law and, in a free liberal society, it is at the heart of the law of property. Penner explains, 'the freedom to determine the use of things is an interest of ours in part because of the freedom it provides to shape our lives'.[380] Lawson and Rudden state, 'the function of the law in relation to private property is to provide us with a bag of tools with which to achieve our wishes'.[381] Property law's function is to facilitate meeting property owners' wishes while balancing others' rights to achieve their wishes also. Understandably, this balancing act means that some sacrifices need to be made.

It would be impossible to meet every single wish, as to meet some wishes other wishes would have to be forgone. It is the function of the law to decide which party's claims prevail. So, for example, a person who owns Blackacre may wish to grow vegetables on his land, while the owner of an adjacent land may wish to use it as a chemical factory that emits toxic omissions that hinder the growth of vegetables. In this case, the law has to decide which freedom

377 Ibid. 314. See French Civil Code, art. 644.

378 Malumián 720.

379 Worthington, *Equity*, 7.

380 Penner, *The Idea of Property Law*, 49.

381 Lawson and Rudden 4.

to restrict, which, most probably, will be the freedom of the chemical plant's owner, especially if the plant was built in an agricultural area. However, this may not always be the case. If the opposite were true, and a landowner in an industrial area decided to use his land for farming, then the law may decide that it would be in the best interest of the economy to dismiss any claim brought forth by the farmer.[382]

In any event, the initial standpoint is that property owners are free to deal with their property as they wish, so any undermining of this principle must be justified and not vice versa. Langbein explains,

> If you start with the root principle that the owner of property has absolute freedom to give it away as he or she pleases, there seems no basis for interfering with this liberty to make arrangements for giving the property away less than absolutely—no reason, in other words, for preventing the donor from tailoring whatever organizational regime the donor care to devise for implementing the gift.[383]

This being the case, in theory at least, the presumption should be that property owners under English law should be allowed to use the *Waqf* structure, even under the mainstream understanding where God is the deemed owner. The burden should be placed on those opposing this to prove why it should not be allowed. One argument could be that the common law, as administered in England and Wales at least, is a secular law that does not recognise structures in which God is the owner. Further, and more pertinently, the concept of God's ownership is tied closely to the idea of mandated perpetuity in *Waqf* law, a concept that is in direct conflict with the rule against perpetuities, as was seen in the previous chapter. This is an immovable obstacle to accepting the conventional *Waqf* law structure. At this point, one has to pursue other avenues for reconciliation, especially as there are alternative ownership theories in Islamic law.[384]

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382 *Sturges v Bridgman* (1879) LR 11 Ch D 852, a tort case in which a baker who had been there all along had to cease operations so as not to disrupt the medical practice of a newcomer to the neighbourhood. In this case, the neighbourhood was in the process of becoming residential from former industrial use.

383 John H. Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale Law Journal 165, 184.

384 The issue of perpetuity was discussed in detail in chapter 3. There is no need to reproduce that discussion in this chapter.

Current Islamic jurists have shown enthusiasm for reconciling *Waqf* and trusts law, and benefiting from trusts for the development of *Waqf* law. In its 20th summit in Istanbul, the European Council for Fatwa and Research (ECFR), a reputable private-based foundation located in Dublin, highlighted the importance and necessity of benefiting from 'trusts', 'foundations', and 'associations' for the development of *Waqf* law and *Waqf* structures.[385] To develop *Waqf* law in this way common ground must be established between *Waqf* and trust law, a platform from which the work can be done. If both structures stand side-by-side irreconcilably, then it would be difficult to use one structure to develop the other.

The Islamic legal heritage is rich, full of possibilities. While there is a hierarchy of authoritative jurists, such as the eponyms of the four schools of thought; in Islamic law, their dispute over most issues has made their views less sacrosanct as may have been the case if Islamic law had one leading juristic figure. Their disputes have re-enforced the idea that their opinions are secondary law, which, although revered, does not hold the sacred status as the primary law sources they cite (i.e. the *Quran* and *Sunnah*). In previous eras, allegiance to schools of thought and therefore particular juristic opinions was mostly geographically or politically determined. This is still true to a large extent today. So, for example, in Saudi Arabia, as the royal family springs from *Ḥanbalī* origins and, as *Ḥanbalī* law largely influences the legal system, the population is increasingly more and more adherent to the *Ḥanbalī* school of thought. Under the Ottoman Empire, by contrast, the *Ḥanafī* school of thought was predominant. To make more progress in making Islamic law more pragmatic, especially in the law of *Waqf*s, allegiance to juristic opinions and schools of thought should be determined less by geography and politics and more by practical socio-economic and reconciliatory considerations.

Outside direct legislative intervention to create exceptions,[386] there are numerous theoretical reconciliatory possibilities. The first is by adopting Lawson and Rudden's interpretation of trusts whereby the trustee is not the legal owner. They believe that calling trustees 'legal owners' is 'inaccurate' and 'misleading'.[387] Although apparently convenient for the purpose of comparison with a *Waqf*, Lawson and Rudden's theory has a gap that is left unanswered.

385 'European Council for Fatwas and Research's 20th summit' (Istanbul, 24–27 June 2010).

386 As discussed in Chapter 3, some jurisdictions have 'variant types of trust' provisions that allow them to recognise different trust structures for foreign jurisdictions, including *Waqf*s. See Lupoi 208. For an example of these provisions, in Belize, see The Trusts Act 2000 (Belize), s.61 & 62.

387 Lawson and Rudden 86–87.

If a trustee is not the legal owner, then who is? There could be two possible answers: there could be another legal owner or none at all. If the former is the case, Lawson and Rudden leave us with no indication as to who that legal owner is; they do not seem to deal with that point at all. If the latter is true, and it is true for some jurisdictions such as Québec,[388] then we have a trust theoretical structure that is very comparable to the classical *Waqf* structure, where there is no legal owner whatsoever. Needless to say that even the former possibility can be reconciled if only legal ownership could be located. So, for example, if, under Lawson and Rudden's theory, the beneficiaries were the legal owners, then this can be reconciled with some interpretations in Islamic law that hold that beneficiaries are the legal owners under a *Waqf*.

'Persistent rights' must also be discussed in brief. Could McFarlane and Stevens's theory be used to describe Islamic *Waqf*s? McFarlane and Stevens claim that 'any legal system can recognise the concept of a right against a right'.[389] This is unjustified in their works; no examples are provided for analogous concepts in other legal systems. The challenge would be for Islamic law to adopt the idea of a right against a right, a 'persistent right'. There are some proprietary rights that bare some resemblance to 'persistent rights'. A mortgage is an example of this: a mortgagee has a proprietary right against the mortgagor's perpetual right over X. But both rights are proprietary. This concept can also be recognised by Islamic law, as it has a whole body of laws governing mortgages under the laws of *Rahn*. The thing about persistent rights, however, is that McFarlane and Stevens have made it clear that they are a new class of rights, neither proprietary, nor personal.[390] Before importing the idea of 'persistent rights' into Islamic *Waqf* law, one must prepare the theoretical groundwork necessary to ascertain whether Islamic law could be receptive to the concept of 'persistent rights'.

The importance of such an endeavor must not be overstated, however, as, for this moment at least, McFarlane and Stevens' theory is descriptive rather than prescriptive. No court has adopted such a concept to characterise the English trust; this is mere theoretical description. If their theory gains more ground and eventually becomes recognised by courts, which is not unforeseeable, then there would be more of a case for investigating whether Islamic law could be more receptive to it.

Another theoretical avenue to pursue is to promote an innovative *Waqf* law structure; the division of ownership structure that was elucidated earlier

388 This was discussed in more detail above.

389 McFarlane and Stevens, 'The Nature of Equitable Property', 2.

390 Ibid. 1–2.

on. The ECFR has already established, from an Islamic legal perspective, that *Waqf* law should be reformed and modernised, benefiting from the law of trusts. This is a way of doing so. Although the separation of ownership theory is no longer as dominant as it was in trust law—it has been critiqued and alternatives have been provided, as discussed above—it is still something that is recognisable by the common law and holds value for comparative purposes. There are, however, potential problems with adopting this approach. First, how could the division of ownership theory work without the supplementary rules of common law? Secondly, in absence of a *Saunders v Vautier* rule in Islamic law and, bearing in mind the increased powers that come with legal ownership, how can the *Mutawallī*'s powers be checked?

In response to the first point, when transplanting an idea from a different legal heritage, one does not need to transplant its supplementary rules in entirety, especially if the receiving legal system already has a comparable branch of law. In this case, Islamic law has a comparable branch of law, i.e. the law of *Waqf*s. Things would be evidently more complicated if one were to transplant the division of ownership theory to a jurisdiction or system that did not recognise trusts, in the generic sense, in any way or form. As this is not the case for our purposes, the problem is less of an obstacle. However, the supplementary rules necessary for its operation must be considered. A legal owner has more power than a manager or an administrator. For one, in theory and practice, he can sell what he owns. This is certainly not the case for *Waqf*s where God, not the *Mutawallī*, owns the *Waqf* property. The *Mutawallī*'s additional *intra vires* powers to deal with the *Waqf* property must be mitigated by ancillary laws that are either developed by Islamic law or are also transplanted from common law. As established above, the *Mutawallī* already has fiduciary responsibilities imposed upon him by Islamic law, the practical question that remains is whether they are enough to govern him after he is recognised as the legal owner.[391]

This leads to the second potential problem, some may allege that Islamic law does not recognise the concept of *Saunders v Vautier*. In response, some Islamic countries have similar, if not more favourable, provisions. Under Iraqi law, for example, a family or mixed (*Mushtarak*) *Waqf*s may be 'liquidated' by an application made by one of the beneficiaries.[392] This is different from *Saunders v Vautier*, where a trust can only be collapsed if the beneficiaries

391 This will have to be dealt with in a different academic paper dedicated to practical, not theoretical considerations, as is the case here.

392 Decree (no. 1) 1955, Permission to Liquidate Family *Waqf*s (Amended), section 3 [my translation of the decree's title].

jointly apply for such a measure. Moroccan law also allows the liquidation of Family *Waqf*s, though it is a little more restrictive than Iraqi law. Moroccan law is also marginally more detailed. Article 122 of Mudawanat Alawqāf 2010 provides that Family *Waqf* properties may be liquidated in four cases.[393] First, if the Family *Waqf* property's value considerably diminishes, or if it no longer has any value.[394] Second, if the Family *Waqf* property no longer provides a benefit.[395] Third, if the Family *Waqf* property's expenditure exceeds its income.[396] Fourth, a *Waqf* may be liquidated if the number of beneficiaries multiplies excessively, and each beneficiary ends up with a fractional share.[397] Article 123 gives power to the Council of *Waqf*s or the majority of the *Waqf*'s beneficiaries to liquidate a *Waqf*.[398] However, discussing this law in Morocco from an Islamic perspective as well, Altāmirī has highlighted the fact that current Moroccan Islamic jurists are in conflict as to whether it is permissible under Islamic law for beneficiaries to 'liquidate' a *Waqf*.[399] *Mālikī*s allow temporary *Waqf*s; they also allow *Waqf* beneficiaries to collapse a *Waqf* if the *Wāqif* gives them the power to do so.[400]

Classical Islamic legal works do not discuss the issue of *Waqf* liquidation at all, even those that accept temporary *Waqf*s. This is because the idea of the beneficiaries having any say as to the *Waqf* property itself is alien to Islamic law. Yes, some jurists allow temporary *Waqf*s. However, that is not because of the beneficiaries' demands, but because the *Wāqif* may, and sometimes does, desire it. In his work on *Waqf*s, 'Ashūb speaks about '*Sharṭ Iḥtiyāj Alwalad*', which is a condition that a *Wāqif* can stipulate in his *Waqf* deed that *Waqf* income can be paid to his children if they become needy.[401] This can happen in a *Waqf Mushtarak*, after the charitable purpose becomes the sole benefactor of *Waqf* income. Although similar in some ways, this is also quite different from the beneficiaries, or a beneficiary among beneficiaries, having the power to liquidate a *Waqf*, as this does not terminate the *Waqf* in any way, it merely

393 Mudawanat Alawqāf 2010, Article 122.

394 Ibid.

395 Ibid.

396 Ibid.

397 Ibid.

398 Ibid., Article 123.

399 'Abdulṣamad Altāmirī, 'Al'aḥbās Almu'aqibah: Alkhuṣūsiyat wa Alishkālāt—Aljuz'a Althānī' *Maroc Droit* (11 March 2011), online: <www.marocdroit.com>.

400 Alḥaṭāb 42–43; Alqarāfī 445–446.

401 'Ashūb 129. Defining what 'in need' means precisely will be something that the *Waqf* deed will have to deal with to avoid uncertainty.

temporarily suspends its purely charitable function. Also, it is only based on a condition previously stipulated by the *Wāqif* in the *Waqf* deed. The understanding is: if the *Wāqif* did not stipulate this condition, the beneficiaries would not have the right. It is not a default right.

In brief, the idea that beneficiaries can liquidate a *Waqf*, in total disregard of the *Wāqif*'s desires, is not one that can be reconciled with Islamic *Waqf* law. Although justified by some current Moroccan jurists, this idea finds no basis in the classical *Waqf* law treatises. The *Wāqif*'s donative power is a commendable act that Islamic law aims to encourage. Even the jurists that allow temporary *Waqf*s do so with the idea that it might incite some wealthy property owners to be more generous with their property, especially if they know that they could take it back at a time of their designation. Further, the reason why all Islamic jurists allow perpetual *Waqf*s, private, charitable, or both, is because of the idea that a perpetual charity (*Ṣadaqah Jāriyah*) is highly commended in Islamic law. Giving the beneficiaries the power to liquidate the *Waqf*, with total disregard to the *Wāqif*'s desire to have a perpetual source of charity, undermines fundamentals that Islamic law has always sought to protect. Family *Waqf* liquidation provisions only came about post colonialism and were hugely influenced by secular colonial anti-family-*Waqf* propaganda. It has not emanated or been developed by Islamic law, even the jurists Altāmirī mentions in his website article are unnamed, and therefore work on this subject, if it exists, is very difficult to find.[402]

The final point regarding the division of ownership theory and *Sauders v Vautier* is that trusts have existed in some common law jurisdictions without the *Saunders v Vautier* rule. This—as has been discussed above and in the previous chapter—is the case in the United States. On the one hand while *Saunders v Vautier* does give more power to the beneficiaries to mitigate the legal ownership vested in the trustee, it is one check amongst others that can perform similar functions. On the other hand, there might be scope for debate on whether the rule under *Saunders v Vautier* could also be transplanted into the Islamic legal system. Recently, as shown above, some legal systems in Islamic countries have promulgated similar rules. However, the lack of support for this in primary evidence and classical treatises of Islamic law makes the task of importing such a concept more problematic and less convincing from an internal Islamic perspective.

402 I have found no serious or scholarly work on this subject.

Conclusion

There is room for congruence in *Waqf* and trusts' ownership theories. Academics such as Lawson and Rudden have put forward theories that—similarly to conventional *Waqf* law—deny that the trustee is the legal owner, although not specifying who is. In addition, jurisdictions, such as Québec (a civilian jurisdiction surrounded by an ocean of common-law jurisdictions), recognises a trust that is owned by no one. By comparison, while classical Islamic sources have not depicted the *Waqf* ownership structure as a division of ownership into legal and beneficial ownership, the groundwork for importing such a theory has already been done. Islamic law does recognise instances in the law of wills where legal and beneficial ownership can be split. There is nothing to suggest that such an idea cannot be transferred across Islamic law's sub-disciplines, especially as the law of wills and the law of *Waqf*s are closely related under the umbrella of property law. Reconciliation between *Waqf* and trust ownership theories is not only possible; there is also a choice of different avenues to pursue in order to achieve it. This is advantageous, as, depending on the lens used to tackle this issue—whether it is an Islamic legal lens, or a common law lens—, the different avenues provide an opportunity to adopt the approach that will most likely work, as viewed from a particular prism. In theory, there is room for congruence, but it remains to be seen whether this congruence will ever be realised in practice.

Conclusion

In the area of private trust and *Waqf* law, this book has shown that English and Islamic law can be reconciled. That is not to say that they are in reconciliation now; they clearly are not but the potential is certainly there. This book has highlighted two main areas of conflict between trusts and *Waqf*s: their respective stances on perpetuities and their contrasting ownership structure. A superficial reading of these two sets of principles may lead to the conclusion that that they are a major hindrance to any reconciliation. However, a serious hermeneutic effort had to be made in order to pierce the language of incongruence that has underpinned much of the comparative legal scholarship in this particular area. One had to canvass a whole range of views, including some that had been overlooked or had never caught on but which performed a necessary function in reconciling the *Waqf* and the trust.

An example of such an opinion in English law is Lawson and Rudden's view that a trustee is an administrator not an owner.[1] In Islamic law, comparatists have also overlooked the *Mālikī* opinion that *Waqf*s may be temporary. While this book would not go as far as stating that the comparatists' decision to ignore such opinions was deliberate, or based on a preconceived normative stance, the book finds that the disregard for such opinions is the main reason why *Waqf*s and trusts have been made to appear irreconcilable. In this, the book not only makes a specific observation regarding the particular issue it hand, it also offers a wider reflection on comparative legal methodology in general. It is true that comparative legal research does not need to be driven in a specific direction, as knowing how two legal systems compare is fruitful in its own right. Nevertheless, if comparative legal research were to be driven in a specific direction, especially in the current global economy and its resultant increased cross-cultural connections, then convergence and not diversion *must* be the ideal.

As illustrated in the first chapter, this book fits within two general discourses: multiculturalism and *Ijtihād*. If multiculturalism were truly to flourish, then each culture must have the ability to observe its particular norms to a certain extent. While Islamic laws are portrayed by some Western media as draconian and as the antithesis to liberalism and Western secular law,[2] this

1 F.H. Lawson and Bernard Rudden, *The Law of Property* (3rd edn, Oxford University Press 2002), 86–87.

2 For example, see the current media controversy surrounding the Law Society's guidelines to solictors on drawing up Shariah compliant wills. Antonia Molloy, 'Islamic law to be enshrined

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book has found that Islamic law, in the area of *Waqf*s at least, has more propensity for reconciliation with Western law, as embodied by English law, than generally believed. Through reinterpretation of Islamic law and English law, commonalities can be found. In our novel multicultural society, multiculturalism by its very nature dictates that the multiplicity of cultures must coexist as different cultures and not as one. In the sphere of private property law, this entails that individual autonomy should be respected to ensure that different cultural sensitivities are taken into account. Commercially, allowing parties to regulate their private interests in accordance to their own conceptions of what is normative will be an incentive to invest. This, after all, is what the common law is trying to facilitate.

With regards to *Ijtihād*, this book has highlighted the continuing importance of performing micro-*Ijtihād* constantly to generate Islamic legislation that deals with modern legal problems. A failure to do so would suggest that an epistemic *Ijtihād* on a wider level would need to take place, or what has been termed in this book as macro-*Ijtihād*. On the substantive issues discussed and analysed in this book, the finding is that *Ijtihād* is still adequately equipped to achieve the objective of reforming and modernising *Waqf* law to meet the challenges of the day. However, one must be cautious of employing inductive reasoning here to come to the conclusion that *Ijtihād*, in its current form, is still the appropriate vehicle for the reform of Islamic law in general. All one can conclude from this work is that that statement is true for *Waqf* law.

This book has also discussed comparative legal methodology and has proposed a theory to support comparative legal research when Islamic law is one of the comparable models, especially where cross-system transferability of norms is the focus of study. The idea put forth is that hermeneutics should play a large role in aiding a researcher to view the Islamic legal system from the inside, as it is internally where solutions should be generated. Other legal systems may have ideas that could benefit Islamic law, but for these ideas to hold any legitimacy or to be accepted by Muslims themselves, they must be

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in British law as solicitors get guidelines on 'Sharia compliant' wills' *The Independent* (23 March 2014) <http://www.independent.co.uk/news/uk/home-news/islamic-law-to-be-enshrined-in-british-law-as-solicitors-get-guidelines-on-sharia-compliant-wills-9210682.html> Alison Phillips, 'Sharia Law just means less human rights especially for women' *Daily Mirror* (25 March 2014) <http://www.mirror.co.uk/news/uk-news/sharia-law-just-means-less-3284948> Sam Webb, 'Sharia law to be enshrined in British legal system as lawyers get guidelines on drawing up documents according to Islamic rules' *The Daily Mail* (23 March 2014) <http://www.dailymail.co.uk/news/article-2587215/Sharia-Law-enshrined-British-legal-lawyers-guidelines-drawing-documents-according-Islamic-rules.html>.

internally justified. This can be done either by adopting another Islamic school of thought's opinion (such as following the *Mālikī* opinion allowing temporary *Waqf*s, to be more in line with the rule against perpetuities), or by attempting to generate this new idea through the mechanism of *Ijtihād*. This latter process was employed in the final chapter, for example, to introduce the division of ownership theory into the Islamic *Waqf* ownership structure.

The second chapter, after explaining some important intricacies of Islamic *Waqf* law, according to the *Ḥanbalī* school of thought, has engaged with the five main criticisms levelled at the current state of *Waqf* law, finding, generally, that Islamic law has the potential to rise above them. Whether it does is a different matter. Regarding the accusation that *Waqf*s evade *Farā'iḍ*, it has been shown that this is not the case as, coupled with *Farā'iḍ, Waṣāyā* and *Hibāt, Waqf* law was designed to be part and parcel of Islamic estates law and is therefore not in conflict with it. The chapter then dispelled the claim that *Waqf* law is incapable of reform by affirming that the laws of *Waqf* were primarily the product of *Ijtihād*, and this being the case, they are not set in stone and are open to change. The criticisms directed at the state of *Mutawallī* management are accepted, though the blame for this state of affairs does not wholly lie with the substantive laws of *Waqf*. Reforms such as professional training of *Mutawallī*s, deterrent punishment for *Waqf* fund embezzlement and stricter governmental regulation in this area have been proposed. The criticisms aimed at perpetuity and inalienability have been explained but not thoroughly engaged with in this chapter, as separate chapters have been devoted to discussing these two important issues. Finally in this chapter, following the work in chapter one, an epistemic argument was made against reforms that were externally designed and that did not go through the Islamic *Ijtihād* machine. While, ultimately, these reforms may be compatible with Islamic law, their external and therefore 'un-sacred' method of generation would make them repugnant to adherents of Islamic law.

The third chapter has shown that Islamic law and the common law are rich enough to provide internal answers for the tension that arises when *Waqf* and trust laws collide. The three seminal colonial cases studied in this chapter illustrate the extent of the tension that exists between Islamic *Waqf* law and the law of trusts, and that if reform does not appease such tension, *Waqf*s and trusts would appear to be irreconcilable. Nevertheless, reconciliation is possible, and in various ways, as this chapter has demonstrated. The key is to encourage latent and potentially comparable interpretations of Islamic and common law as opposed to mainstream interpretations that are not in congruence. This guarantees reform that is workable as well as legitimate, rather than reform that is forced by one legal system upon another. This was illustrated by

the debate surrounding perpetuities. This chapter not only found that Islamic law could be more accommodating of the rule against perpetuities by adopting the *Mālikī* opinion that permits temporary *Waqf*s; it has also found that some common law jurisdictions, such as various US states and Canadian provinces, have abolished the rule against perpetuities and are therefore potentially more receptive to perpetual family *Waqf*s.

The fourth chapter has shown that there is room for congruence in *Waqf* and trusts' ownership theories. Academics such as Lawson and Rudden have put forward theories that—similarly to conventional *Waqf* law—deny that the trustee is the legal owner, although not specifying who is. In addition, jurisdictions, such as Québec (a civilian jurisdiction surrounded by an ocean of common-law jurisdictions), recognises a trust that is owned by no one. By comparison, while classical Islamic sources have not depicted a *Waqf* ownership structure as a division between legal and beneficial ownership, the groundwork for importing such a theory has already been done. Islamic law does recognise instances in the law of wills where legal and beneficial ownership can be split. There is nothing to suggest that such an idea cannot be transferred across Islamic law's sub-disciplines, especially as the law of wills and the law of *Waqf*s are closely related under the umbrella of property law. Reconciliation between *Waqf* and trust ownership theories is not only possible; there is also a choice of different avenues to pursue in order to achieve it. This is advantageous, as, depending on the approach used to tackle this issue—whether it is an Islamic legal approach, or a common law approach—, the different avenues provide an opportunity to adopt the approach that will most likely work, as viewed from a particular prism. In theory, there is room for congruence, but it remains to be seen whether this congruence will ever be realised in practice.

Lastly, research is always about the subject and never about the researcher. It does not matter whether a researcher makes an incremental or monumental advance, as long as it is an advance. Ultimately, research is a collaborative effort; one can only build upon what others have built before him. Consequently, one must also advance the wheel of research so that subsequent researchers have a more elaborate platform from which to continue. So, while this PhD has given me the research torch for almost three years, I would like to hand it over to other researchers, with a larger flame and a more refined sense of direction. Therefore, I shall end my book with a brief recommendation as to what later researchers could look into in the field of comparative *Waqf* and trust law. They could consider the Hague Convention on the Law Applicable to Trusts and discern whether countries that apply Islamic law could adopt the Convention and whether Islamic law would recognise or conflict with the Convention. They could also research the legislation, adopted by some Islamic

countries, which allows beneficiaries to liquidate family *Waqf*s, whether such legislation is contrary to Islamic law and how it compares to *Saunders v Vautier* in English law, for example.[3] Empirical studies are needed on how long supposedly 'perpetual' family *Waqf*s have endured and also the feasibility of the creation of a uniform *Waqf* law. Finally, I hope that this book and others like it will serve as encouragement for more work to be done in the area of comparative *Waqf* and trust law, for the possibilities are many and the potential is unquestionable.

3 *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.

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Index